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REPORTS OF CASES

DETERMINED IN

The several Courts of Westminster-Hall,

FROM

1746 TO 1779:

BY THE HONOURABLE

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS:

WITH

MEMOIRS OF HIS LIFE.

Second Edition,

REVISED AND CORRECTED,

WITH

COPIOUS NOTES AND REFERENCES,

INCLUDING SOME

FROM THE MSS. OF THE LATE MR. SERJT. HILL:

BY

CHARLES HENEAGE ELSLEY, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

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PREFACE

TO THE SECOND EDITION.

IN presenting this Edition of the Reports, of the late Sir WILLIAM BLACKSTONE to the Profession, it will probably not be thought impertinent to make a few remarks upon the former or original Edition; and it will be necessary to give some account in what manner and with what view the present one has been attempted.

THE former or first Edition was a posthumous one; but that it was intended for publication by the learned Judge, appears from a clause in his will, directing, "That his MS. Reports of Cases determined in Westminster Hall, taken by himself, and contained in several large note books, be published after his decease." But though they were thus, in a manner, bequeathed by this celebrated author to the public; and though it is said in the Preface to the first edition, that they were prepared by him, even to an index and a table of matters, and the editor of that edition is of opinion that they are only such "as he had selected out of many, from his rough notes:" yet the learned reporter himself speaks of them as being contained "*in note books*;" and, indeed, they bear internal evidence of being mere notes. They consist of short broken sentences; the grammatical construction is imperfect, and the syntax is incomplete: the cases contain only the heads of the argument or judgment, from which a complete report might have been formed; and it is not to be supposed, but that the elegant writer of the

Commentaries could have presented them to the world in a very different shape. These circumstances, however, stamp the work with every appearance of authenticity and genuineness. It is to be observed, that the cases contained in the first volume, which were taken by Mr. BLACKSTONE while at the bar, are in a much more rough and incomplete state than those in the second volume, taken by him when on the bench. There, many of his own judgments are given very copiously and at great length, so that there is reason to conclude, that they are reported exactly as delivered by him, possibly from a written paper.

THESE Reports have been for some time not in the best repute, partly from an observation made upon them by Lord MANSFIELD, and partly from their own loose and imperfect style. His Lordship is reported to have said, in the case of *Hassell v. Simpson*, 1 Doug. 91, n., "We must not always rely on the words of Reports, though under great names. Mr. J. BLACKSTONE's Reports are not very accurate." It was the case of *Law v. Skinner*, (reported in the second volume, p. 996), to which Lord MANSFIELD alluded, and which he seems not to have perfectly understood. It has been relied upon as an authority in many subsequent cases; see p. 997, n. (t). And in the case of *Ackworth v. Kemp*, 1 Doug. 43, when that of *Sanderson v. Baker*, as contained in 3 Wilson's Reports, 309, was cited, Lord MANSFIELD said, "The printed account of the case," (meaning that in Wilson), "shews the danger of inaccurate reports. I have a very correct report of it from Mr. J. BLACKSTONE's own note, which I will read:" and he then read the case as reported in the second volume, p. 831. Serjeant WILLIAMS also bears testimony to the correctness of the case of *Smith v. Parker*, as reported by Mr. J. BLACKSTONE, in his notes to the case of *Jeffreson v. Morton*, 2 Wms. Saund. 8 i;—see Vol. II. p. 1232, n. (w), of this work. Several of the cases contained in this Work are also to be found in the collections of contemporary reporters. Almost all the King's Bench cases are to be found in the Reports of Sir JAMES BURROWS, and a great many of those decided in the Common Pleas, in the reports of Mr. Serjeant WILSON. It would be invidious to make comparisons between the merits of each: the cases collected by Sir J. BURROWS are reported at very great length, but with such tiresome prolixity and wearisome minuteness, that one is almost inclined to prefer the conciseness and compendiousness of Sir W. BLACKSTONE's notes. This observation applies in some measure to Mr. Serjeant WILSON's Reports.

It will appear from the foregoing account, that there was scope for great improvement in this new edition; and I shall proceed to state in what manner that has been attempted. I have examined the whole of the text, and have ventured occasionally to introduce a word to make a sentence complete: the word inserted will be found between brackets, thus []. If the alteration or insertion of a word or phrase has materially altered the sense of a passage, that circumstance is explained in a note. I have also in some instances altered the spelling of the words to the modern usage; in others I have left it as it originally stood. I have also examined all the original references, and where the name only of a case is mentioned, I have given a reference to the book in which it is reported, if I have been able to meet with it in print. The labour of this part of the task can only be appreciated by gentlemen who have themselves been engaged in a similar undertaking. In the former edition, a full stop or point was used after every figure, and as the name of the case is sometimes placed before and sometimes after the reference, where the name of the case came between two references, it was difficult to say to which it belonged: this is now obviated by placing a comma only between the name of the case and its reference. In the same manner, the sentence connected with an authority cited is only separated from it by a semicolon. With regard to the notes, it was my intention originally to have collected merely the modern references, in the margin; but upon having to recur to modern editions of old reporters, in which that had been done, I found so much inconvenience from that plan, that I thought it advisable to attempt an arrangement of them. To do this effectually, I have given a short abstract of the case or point bearing upon that in the text, so that the reader may see at once whether it will answer the purpose of his search to be at the trouble of consulting the cases referred to, and I have inserted the note or reference at the place where it seemed most applicable. I have also endeavoured to shew what cases have been over-ruled, and what have been recognised and confirmed by subsequent decisions, and the grounds for so doing: and where I have found any of the cases in the text observed upon by the Judges in more recent ones, I have taken the liberty of inserting that part of their judgment at some length. From these causes, the notes have increased in bulk beyond what was at first intended, though it has been my endeavour to compress the matter as much as possible. It probably will be said, that, in some instances, too much has been done; that, in others, the work has been left short;—so difficult is it to arrive at the proper mean. I

have formed an entire new Index to all the principal points, as well in the notes as in the text, which, it is hoped, will be more convenient than the former one. There is only one Index, and one Table of Cases to both volumes, as the same paging runs through both.

I must be aware that there are many imperfections in this edition. It is, however, submitted to the kind consideration of the Profession, and I shall think that I have in some measure attained my object, if I have in any way contributed to render the Reports of Sir WILLIAM BLACKSTONE more generally acceptable and useful.

C. H. ELSLEY.

PATRICK BROMPTON, YORKSHIRE,
October 30, 1827.

PREFACE TO THE FIRST EDITION.

THE well known, and highly established character of the Compiler of these Reports, not only as a consummate lawyer, but as an elegant, correct, and instructive writer, may very justly be thought sufficient to render an introductory discourse unnecessary.

And indeed of this the editor is so thoroughly sensible, that it is not his intention in this address to the reader, to say any thing in favour of a work, which, he is satisfied, the name alone in the title page will amply recommend.

But as there are some circumstances relative to these Reports, which, he is advised, are proper to be communicated with them, he found the province he had undertaken would necessarily require a short introduction.

He has also been persuaded by many friends of the learned Judge, to pay a tribute due to the memory of so respectable a person, by imparting at the same time to the public a short account of his life, and gradual rise from a posthumous orphan to the dignity and high station he at last attained, which he filled so much to his own credit, and the future, as well as the present honour and advantage of the nation in general.

This the editor wished to have been the work of an abler pen*, but, being disappointed in those wishes, rather than injustice should be done to a character he so much esteemed, by an incorrect or injurious narrative, he has ventured, though totally unused to writing for the public eye, to undertake the task himself.

An intimate acquaintance with Mr. Justice Blackstone for above thirty years, the assistance of other friends who had known him much longer, and a short abstract of every circumstance of consequence in his life, written by himself with his accustomed accuracy, afford the editor ample materials for the purpose.

These he has collected, and endeavoured to arrange in such a manner, as to form a faithful and impartial account of the life of

* The learned and ingenious Dr. Buckler, Fellow of All-Souls College, and *Custos Archivorum* in the University of Oxford; one of Mr. Justice Blackstone's oldest and most intimate friends; and in that, and every other respect, well qualified to have undertaken this work; which, though much soli-

cited by the editor and many of his friends, he could not be prevailed on to do, on account of his declining state of health. He died in December last, and has bequeathed a sum of money to the college, towards erecting a statue in it, to the memory of Mr. Justice Blackstone.—*Note to the First Edition.*

this great man; not only with a view to gratify the curiosity of the public, ever eager to learn something more than the mere name of every distinguished character: but, he flatters himself, that, in discharging this duty of friendship by the dead, he shall hold forth to the rising generation a bright example of a man, who, without fortune, family interest, or connexions, raised himself by a diligent attention to his studies, even from his earliest youth, and the strictest sense of every moral and religious duty, to a very eminent and honourable office in his profession; and which, had his health and constitution been equal to the faculties of his mind, would most probably have advanced him to one of the highest.

He was born on the 10th of July, 1723, in Cheapside, in the parish of St. Michael le Querne, at the house of his father, Mr. Charles Blackstone, a Silk-man, and citizen and bowyer of London; who was the third son of Mr. John Blackstone, an eminent Apothecary in Newgate-Street, descended from a family of that name in the West of England, at or near Salisbury: his mother was Mary, eldest daughter of Lovelace Bigg, Esquire, of Chilton Foliot in Wiltshire.

He was the youngest of four children; of whom John died an infant, Charles the eldest, and Henry the third, were educated at Winchester School, under the care of their uncle Dr. Bigg, warden of that society, and were afterwards both Fellows of New College, Oxford; Charles is still living, a Fellow of Winchester, and Vicar of Wimering in Hampshire: Henry, after having practised physic for some years, went into holy orders, and died in 1778, Vicar of Adderbury in Oxfordshire, a living in the gift of New College.

Their father died some months before the birth of William, the subject of these memoirs; and their mother died before he was twelve years old.

The being thus early in life deprived of both parents, an event generally deemed the greatest misfortune that can befall a child, proved in its consequences to him the very reverse: to that circumstance probably he was indebted for his future advancement, and that high literary character and reputation in his profession, which he has left behind him; to that circumstance the public too is probably indebted for the benefit it has received, and will receive, as long as the law of England remains, from the labours of his pen.

For, had his father lived, it is most likely, that the third son of a London tradesman, not of great affluence, would have been bred in the same line of life, and those parts, which have so much signalized the possessor of them, would have been lost in a warehouse or behind a counter.

But, even from his birth, the care both of his education and fortune was kindly undertaken by his maternal uncle, Mr. Thomas Bigg, an eminent Surgeon in London, and afterwards, on the death of his elder brothers, owner of the Chilton estate, which is still enjoyed by that family.

The affectionate, it may be said the parental, care this worthy man took of all his nephews, particularly in giving them liberal

educations, supplied the great loss they had so early sustained, and compensated in a great degree for their want of more ample fortunes. And it was always remembered, and often mentioned by them all with the sincerest gratitude.

In 1730, being about seven years old, he was put to school at the Charter-House; and in 1735 was, by the nomination of Sir Robert Walpole, on the recommendation of Charles Wither of Hall in Hampshire, Esquire, his cousin by the mother's side, admitted upon the foundation there.

In this excellent seminary he applied himself to every branch of youthful education, with the same assiduity which accompanied his studies through life. His talents and industry rendered him the favourite of his masters, who encouraged and assisted him with the utmost attention; that at the age of fifteen he was at the head of the school, and, although so young, was thought well qualified to be removed to the University; and he was accordingly entered a Commoner at Pembroke College in Oxford, on the 30th of November, 1738, and was the next day matriculated.

At this time he was elected to one of the Charter-House exhibitions by the Governors of that foundation, to commence from the Michaelmas preceding, but was permitted to continue a scholar there till after the 12th of December, being the anniversary commemoration of the founder, to give him an opportunity of speaking the customary oration, which he had prepared, and which did him much credit.

About this time also he obtained Mr. Benson's gold prize medal of Milton, for verses on that poet.

Thus, before he quitted school, did his genius begin to appear, and receive public marks of approbation and reward. And so well pleased was the Society of Pembroke College with their young pupil, that, in the February following, they unanimously elected him to one of Lady Holford's exhibitions for Charter-House scholars in that house.

Here he prosecuted his studies with unremitting ardour; and although the Classics, and particularly the Greek and Roman poets, were his favourites, they did not entirely engross his attention: Logic, Mathematics, and the other sciences were not neglected; from the first of these (studied rationally, abstracted from the jargon of the schools,) he laid the foundation of that close method of reasoning he was so remarkable for: and from the Mathematics, he not only reaped the benefit of using his mind to a close investigation of every subject that occurred to him, till he arrived at the degree of demonstration the nature of it would admit; but he converted that dry study, as it is usually thought, into an amusement, by pursuing the branch of it which relates to architecture.

This science he was peculiarly fond of, and made himself so far master of it, that, at the early age of twenty, he compiled a treatise intitled *Elements of Architecture*, intended for his own use only, and not for publication, but esteemed by those judges who have perused it, in no respect unworthy his maturer judgment, and more exercised pen.

Having determined on his future plan of life, and made choice of the law for his profession, he was entered in the Middle Temple on the 20th of November, 1741. He now found it necessary to quit the more amusing pursuits of his youth, for the severer studies to which he had dedicated himself; and betook himself seriously to reading law.

How disagreeable a change this must have been to a young man of brilliant parts, and a fine imagination, glowing with all the classical and poetical beauties he had stored his mind with, is easier conceived than expressed: he alone, who felt, could describe his sensations on that occasion; which he did in a copy of verses, since published by Dodsley in the 4th volume of his *Miscellanies*, intitled, *The Lawyer's Farewell to his Muse*; in which the struggle of his mind is expressed so strongly, so naturally, with such elegance of sense and language, and harmony of versification, as must convince every reader, that his passion for the Muses was too deeply rooted to be laid aside without much reluctance, and that, if he had pursued that flowery path, he would not perhaps have proved inferior to the best of our English poets.

Several little fugitive pieces, besides this, have at times been communicated by him to his friends, and he has left (but not with a view of publication) a small collection of juvenile pieces, both originals and translations, which do him no discredit, inscribed with this line from Horace,

“Nec luisse pudet, sed non incidere ludum.”

Some notes on Shakespeare, which just before his death he communicated to Mr. Steevens, and which were inserted by him in his last edition of that author, shew how well he understood the meaning, as well as the beauties of that his favourite among the English poets*.

In November, 1743, he was elected into the Society of All-Souls College; and, in the November following, he spoke the Anniversary Speech in commemoration of Archbishop Chichele, the founder, and the other benefactors to that house of learning, and was admitted actual Fellow.

From this period he divided his time between the University and the Temple, where he took chambers, in order to attend the Courts. In the former he pursued his academical studies, and on the 12th of June, 1745, commenced Bachelor of Civil Law; in the latter he applied himself closely to his profession, both in the Hall and in his private studies, and, on the 28th of November, 1746, was called to the Bar.

* The editor here thinks himself happy in having so fair an opportunity of acknowledging, that the verses, published in his name, in the Oxford Collection on the death of the late Prince of Wales in 1751, and which, he may now say without vanity, were justly esteemed one of the best compositions in that collection, were written by Mr. Blackstone; who at that time exacted a promise of secrecy; which promise the editor now looks upon himself as absolved from; and feels a

sensible satisfaction in restoring to the right owner that applause, he has so long received without any pretensions. And he flatters himself, this public acknowledgment will atone for his having so long permitted this to have remained, generally, unknown, more especially as, on those occasions, it is by no means unusual, or reckoned a discredit to a young man, to have his name prefixed to the production of another person.—*Note to the First Edition.*

The first years of a counsel's attendance on the Courts afford little matter proper to be inserted in a narrative of this kind; and he, in particular, not being happy in a graceful delivery or a flow of elocution, (both which he much wanted), nor having any powerful friends or connexions to recommend him, made his way very slowly, and acquired little notice and little practice; yet he then began to lay in that store of knowledge in the law, which he has since communicated to the world, and contracted an acquaintance with several of the most eminent men in that profession, who saw, through the then intervening cloud, that great genius, which afterwards broke forth with so much splendour.

At Oxford, his active mind had more room to display itself, and, being elected into the office of Bursar, soon after he had taken his degree, and finding the muniments of the College in a confused, irregular state, he undertook and completed a thorough search, and a new arrangement, from whence that Society reaped great advantage. He found also, in the execution of this office, the method of keeping accounts, in use among the older Colleges, though very exact, yet rather tedious and perplexed; he drew up, therefore, a dissertation on the subject, in which he entered into the whole theory, and elucidated every intricacy that might occur. A copy of this tract is still preserved for the benefit of his successors in the Bursarship.

But it was not merely the estates, muniments, and accounts of the College, about which he was usefully employed, during his residence in that Society. The Codrington Library had for many years remained an unfinished building. He hastened the completion of it, rectified several mistakes in the architecture, and formed a new arrangement of the books, under their respective classes.

The late Duke of Wharton, who had engaged himself by bond to defray the expence of building the apartments between the Library and Common Room, being obliged soon after to leave his country, and dying in very distressed circumstances, the discharge of this obligation was long despaired of. It happened, however, in a course of years, that his Grace's executors were enabled to pay his debts, when, by the care and activity of Mr. Blackstone, the building was completed, the College thereby enabled to make its demand, and the whole benefaction recovered.

In May, 1749, as a small reward for his services, and to give him further opportunities of advancing the interests of the College, he was appointed Steward of their Manors. And, in the same year, on the resignation of his uncle, Seymour Richmond, Esq., he was elected Recorder of the borough of Wallingford, in Berkshire, and received the King's approbation on the 30th of May.

The 26th of April, 1750, he commenced Doctor of Civil Law, and thereby became a member of the Convocation, which enabled him to extend his views, beyond the narrow circle of his own society, to the general benefit of the University at large.

In this year he published *An Essay on Collateral Consanguinity*, relative to the claim made by such as could, by a pedi-

gree, prove themselves of kin to the founder of All-Souls College, of being elected, preferably to all others, into that society.

Those claims became now so numerous, that the College, with reason, complained of being frequently precluded from making choice of the most ingenious and deserving candidates.

In this treatise, being his first publication, he endeavoured to prove, that as the kindred to the founder, a popish ecclesiastic, could not but be collateral, the length of time elapsed since his death must, according to the rules both of the civil and canon law, have extinguished consanguinity; or that the whole race of mankind were equally founder's kinsmen.

This work, although it did not answer the end proposed, or convince the then Visitor, yet did the author great credit, and shewed he had read much, and well digested what he had read. And most probably, the arguments contained in it had some weight with his Grace the present Archbishop of Canterbury, when, a few years ago, on application to him, as Visitor of the College, he formed a new regulation, which gives great satisfaction by limiting the number of founder's kin, whereby the inconvenience complained of is in a great measure removed, without annihilating a claim founded on the express words of the College statutes. And it must be observed, that, in forming this new regulation, his Grace made choice of Mr. Justice Blackstone as his common-law assessor, together with that eminent civilian, Dr. Hay, well knowing how much he was master of the subject then under consideration.

After having attended the Courts in Westminster-hall for seven years, and finding the profits of his profession very inadequate to the expence, in the summer of the year 1753, he determined to retire to his fellowship and an academical life, still continuing the practice of his profession, as a provincial counsel. He had previously planned, what he now began to execute, his Lectures on the Laws of England; a work which has so justly signalized his name, and rewarded his labours.

In the ensuing Michaelmas Term he entered on his new province of reading these Lectures; which, even at their commencement, such were the expectations formed from the acknowledged abilities of the lecturer, were attended by a very crowded class of young men of the first families, characters, and hopes.

In July, 1755, he was appointed one of the Delegates of the Clarendon Press. On his entering on this office, he discovered many abuses, which required correction; much mismanagement, which demanded new and effectual regulations. In order to obtain a thorough insight into the nature of both, he made himself master of the mechanical part of printing; and, to promote and complete a reform, he printed a letter on the subject, addressed to Dr. Randolph, at that time Vice-Chancellor.

This and his other endeavours produced the desired effect, and he had the pleasure of seeing, within the course of a year, the reform he had proposed carried into execution, much to the honour, as well as the emolument of the University, and the satisfaction of all its friends.

While engaged in these pursuits, he drew up a small tract relative to the management of the University press. This he left for the use of his successors in that office; and the Editor has lately been assured by one of the present Delegates, that it is held in high esteem, and regarded by them as the ground-work, not only of the improvements hitherto made, but of those also which are still intended.

About a year before this he published *An Analysis of the Laws of England*, as a guide to those gentlemen who attended his lectures, on their first introduction to that study; in which he reduced that intricate science to a clear method, intelligible to the youngest student.

In the year 1757, on the death of Dr. Coxed, Warden of Winchester, he was elected by the surviving Visitors of Michel's new Foundation in Queen's College into that body. This new situation afforded fresh matter for his active genius to exercise itself in; and it was chiefly by his means, that this donation, which had been for some years matter of contention only, became a very valuable acquisition to the College, as well as an ornament to the University, by completing that handsome pile of building towards the High street, which for many years had been little better than a confused heap of ruins.

The engrafting a new set of Fellows and Scholars into an old established society could not be an easy task, and in the present instance was become more difficult, from the many unsuccessful attempts that had been made, all of which had only terminated in disputes between the members of the old, and the Visitors of the new Foundation; yet, under these circumstances, Dr. Blackstone was not disheartened, but formed and pursued a plan, calculated to improve Mr. Michel's original donation, without departing from his intention; and had the pleasure to see it completed, entirely to the satisfaction of the members of the old Foundation, and confirmed, together with a body of statutes he drew for the purpose, by act of Parliament, in the year 1769.

Being engaged as counsel in the great contest for knights of the shire for the county of Oxford, in 1754, he very accurately considered a question then much agitated, Whether copyholders of a certain nature had a right to vote in county elections?

He afterwards reduced his thoughts on that subject into a small treatise; and was prevailed on by Sir Charles Mordaunt, and other members of Parliament, who had brought in a bill to decide that controverted point, to publish it in March, 1758, under the title of *Considerations on Copyholders*. And the bill soon after received the sanction of the Legislature, and passed into a law.

Mr. Viner having by his will left not only the copyright of his Abridgment, but other property, to a considerable amount, to the University of Oxford, to found a professorship, fellowships, and scholarships of common law, he was, on the 20th of October, 1758, unanimously elected Vinerian Professor; and, on the 25th of the same month, read his first introductory lecture; one of the most elegant and admired compositions which any age or country ever produced: this he published at the request of the Vice-

Chancellor and Heads of Houses, and afterwards prefixed to the first Volume of his Commentaries.

His Lectures had now gained such universal applause, that he was requested by a noble personage, who superintended the education of our present Sovereign, then Prince of Wales, to read them to his Royal Highness: but, as he was at that time engaged to a numerous class of pupils in the University, he thought he could not, consistently with that engagement, comply with this request, and therefore declined it. But he transmitted copies of many of them for the perusal of his Royal Highness; who, far from being offended at an excuse grounded on so honourable a motive, was pleased to order a handsome gratuity to be presented to him.

And here the Editor hopes it will not be thought too presumptuous in him to suppose, that this early knowledge of the character and abilities of the Professor laid the first foundation in his Majesty's royal breast of that good opinion and esteem, which afterwards promoted him to the Bench; and, when he was no more, occasioned the extension of the Royal bounty, in the earliest hours of her heavy loss, (unthought of and unsolicited), to his widow and his numerous family.

In the year 1759, he published two small pieces merely relative to the University: the one intitled, *Reflections on the Opinions of Messrs. Pratt, Morton, and Wilbraham, relating to Lord Litchfield's Disqualification*, who was then a candidate for the Chancellorship; the other, *A Case for the Opinion of Counsel on the Right of the University to make new Statutes*.

Having now established a reputation by his Lectures, which he justly thought might entitle him to some particular notice at the Bar, in June, 1759, he bought chambers in the Temple, resigned the office of Assessor of the Vice-Chancellor's Court, which he had held about six years, and, soon after, the Stewardship of All-Souls College; and, in Michaelmas Term, 1759, resumed his attendance at Westminster; still continuing to pass some part of the year at Oxford, and to read his Lectures there, at such times as did not interfere with the London Terms. The year before this he declined the honour of the Coif, which he was pressed to accept of by Lord Chief Justice Willes, and Mr. Justice (now Earl) Bathurst.

In November, 1759, he published a new edition of the Great Charter and Charter of the Forest; which added much to his former reputation, not only as a great lawyer, but as an accurate antiquarian and an able historian. It must also be added, that the external beauties in the printing, the types, &c. reflected no small honour on him, as the principal reformer of the Clarendon press, from whence no work had ever before issued equal, in those particulars, to this.

This publication drew him into a short controversy with the late Dr. Lyttelton, then Dean of Exeter, and afterwards Bishop of Carlisle.—The Dean, to assist Mr. Blackstone in his publication, had favoured him with the collation of a very curious, ancient Roll, containing both the Great Charter and that of the Forest, of

the 9th of Henry the 3d, which he and many of his friends judged to be an original. The Editor of the Charters, however, thought otherwise, and excused himself (in a note in his Introduction) for having made no use of its various readings, "as the plan of his edition was confined to Charters which had passed the Great Seal, or else to authentic entries and enrolments of record, under neither of which classes the Roll in question could be ranked."

The Dean upon this, concerned for the credit of his roll, presented to the Antiquary Society a vindication of its authenticity, dated June the 8th, 1761, and Mr. Blackstone delivered in an answer to the same learned body, dated May the 28th, 1762, alleging as an excuse for the trouble he gave them, "that he should think himself wanting in that respect, which he owed to the Society and Dr. Lyttelton, if he did not either own and correct his mistake, in the octavo edition then preparing for the press, or submit to the Society's judgment the reasons at large, upon which his suspicions were founded." These reasons, we may suppose, were convincing, for here the dispute ended*.

About the same time he also published a small Treatise on the Law of Descents in fee simple.

A dissolution of Parliament having taken place, he was in March, 1761, returned burgess for Hindon in Wiltshire; and on the 6th of May following had a patent of precedence granted him to rank as King's Counsel, having a few months before declined the office of Chief Justice of the Court of Common Pleas, in Ireland.

Finding himself not deceived in his expectations in respect to an increase of business in his profession, he now determined to settle in life, and, on the 5th of May, 1761, he married Sarah, the eldest surviving daughter of the late James Clitherow, of Boston House, in the county of Middlesex, Esquire; with whom he passed near nineteen years, in the enjoyment of the purest domestic and conjugal felicity, (for which no man was better calculated), and which, he used often to declare, was the happiest part of his life. By her he had nine children, the eldest and youngest of whom died infants; seven survived him, viz. Henry, James, William, Charles, Sarah, Mary, and Philippa; the eldest not much above the age of sixteen at his death.

His marriage having vacated his fellowship at All-Souls, he was, on the 28th of July, 1761, appointed by the Earl of Westmorland, at that time Chancellor of Oxford, Principal of New Inn Hall. This was an agreeable residence during the time his lectures required him to be in Oxford, and was attended with this

* It may be here mentioned, that, as an Antiquarian, and a member of this Society, into which he was admitted February the 5th, 1761, he wrote "A Letter to the Honorable Daines Barrington, describing an antique seal, with some observations on its original, and the two successive Controversies which the dispute of it afterwards occasioned."

This Seal, having the royal arms of Eng-

land on it, was one of those, which all persons having the exercise of ecclesiastical jurisdiction, were obliged by the statute of the 1st of Ed. 6th, ch. 2, to make use of. This Letter is printed in the 3d volume of the *Archæologia*; but his discussion of the merits of the Lyttelton Roll, though containing much good antiquarian criticism, has not yet been made public.—*Note to the First Edition.*

additional pleasing circumstance, that it gave him rank, as the head of a house in the University, and enabled him, by that means, to continue to promote whatever occurred to him, that might be useful and beneficial to that learned body.

An attempt being made about this time to restrain the power given him, as Professor, by the Vinerian statutes, to nominate a deputy to read the solemn lectures, he published a state of the case for the perusal of the Members of Convocation, upon which it was dropped.

In the following year, 1762, he collected and republished several of his pieces under the title of *Law Tracts*, in two volumes, octavo.

In 1763, on the establishment of the Queen's family, he was appointed Solicitor-General to her Majesty; and was chosen about the same time a Benchcr of the Middle Temple.

Many imperfect and incorrect copies of his lectures having by this time got abroad, and a pirated edition of them being either published, or preparing for publication in Ireland, he found himself under a necessity of printing a correct edition himself; and in November, 1765, published the first volume, under the title of *Commentaries on the Laws of England*, and in the course of the four succeeding years the other three volumes; which completed a Work, that will transmit his name to posterity among the first class of English authors, and will be universally read and admired, as long as the laws, the constitution, and the language of this country remain.

In the year 1766, he resigned the Vinerian Professorship, and the Principality of New Inn Hall; finding he could not discharge the personal duties of the former, consistently with his professional attendance in London, or the delicacy of his feelings as an honest man.

Thus was he detached from Oxford, to the inexpressible loss of that University, and the great regret of all those who wished well to the establishment of the study of the law therein. When he first turned his views towards the Vinerian Professorship, he had formed a design of settling in Oxford for life: He had flattered himself, that by annexing the office of Professor to the Principality of one of the Halls, (and perhaps converting it into a college), and placing Mr. Viner's fellows and scholars under their Professor, a society might be established for students of the common law, similar to that of Trinity-Hall in Cambridge, for civilians.

Mr. Viner's will very much favoured this plan. He leaves to the University "all his personal estate, books, &c. for the constituting, *establishing*, and endowing one or more Fellowship or Fellowships, and Scholarship or Scholarships, *in any College or Hall* in the said University, as to the Convocation shall be "thought most proper for Students of the Common Law." But notwithstanding this plain direction to establish them in *some* College or Hall, the clause from the Delegates, which ratified this designation, had the fate to be rejected by a negative in Convocation.

By this unexpected, and, I must assume the liberty of saying, unmerited rejection, Mr. Blackstone's prospects in Oxford had no longer the same allurements to make him think of a lasting settlement there. His views of an established society for the study of the common law were at an end, and no room left him for exerting, in this instance, that ardour for improvement which constituted a distinguishing part of his character.

In the new Parliament, chosen in 1768, he was returned burgess for Westbury in Wiltshire.

In the course of this Parliament, the question, "whether a member expelled was or was not eligible in the same Parliament," was frequently agitated in the House with much warmth, and what fell from him in a debate being deemed by some persons contradictory to what he had advanced on the same subject in his Commentaries, he was attacked with much asperity in a pamphlet supposed to be written by a baronet, a member of that House. To this charge he gave an early reply in print.

In the same year, Dr. Priestly animadverted on some positions in the same work, relative to offences against the doctrine of the Established Church, to which he published an answer.

The Compiler of these sheets, desirous of avoiding all controversy, contents himself with the bare mentioning these two publications, without giving any opinion concerning their respective merits. As the works of the author whose life he is writing, it is his duty not to omit the mention of them: but how far the charges of his antagonists were founded in reason, and supported by argument; or whether he by his answers sufficiently exculpated himself from these charges, must be left to the determination of those who have been, or may become readers of them. The Compiler's only intent is to write a faithful narrative, not a professed panegyric.

Mr. Blackstone's reputation as a great and able lawyer was now so thoroughly established, that had he been possessed of a constitution equal to the fatigues attending the most extensive business of the profession, he might probably have obtained its most lucrative emoluments and highest offices. The offer of the Solicitor-Generalship, on the resignation of Mr. Dunning in January, 1770, opened the most flattering prospects to his view. But the attendance on its complicated duties at the Bar, and in the House of Commons, induced him to refuse it.

But though he declined this path, which so certainly, with abilities like Mr. Blackstone's, leads to the highest dignities in the law, yet he readily accepted the office of Judge of the Common Pleas, when offered to him on the resignation of Mr. Justice Clive; to which he was appointed on the 9th of February, 1770. Previous, however, to the passing his patent, Mr. Justice Yates expressed an earnest wish to remove from the King's Bench to the Court of Common Pleas. To this wish Mr. Blackstone, from motives of personal esteem, consented; but, on his death, which happened between the ensuing Easter and Trinity Terms, Mr. Blackstone was appointed to his original destination in the Common Pleas.

On his promotion to the Bench he resigned the recordership of Wallingford.

As it has been before remarked, that this is not intended as a panegyric, but only as a faithful, though unadorned, narrative, nothing shall here be said of his conduct as a Judge. His loss is too recent to need any remarks on it to his contemporaries, who have been witnesses of that conduct, and heard his decisions: to posterity, the latter part of the work to which this is prefixed will speak sufficiently, as the second volume is entirely composed of cases determined whilst he sat on the Bench.

He seemed now arrived at the point he always wished for, and might justly be said to enjoy *otium cum dignitate*. Freed from the attendance at the Bar, and what he had still a greater aversion to, in the Senate, "where," to use his own expression, "amid the rage of contending parties, a man of moderation must expect to meet with no quarter from any side," although he diligently and conscientiously attended the duties of the high office he was now placed in, yet the leisure afforded by the legal Vacations he dedicated to the private duties of life, which, as the father of a numerous family, he now found himself called upon to exercise, or to literary retirement, and the society of his friends, at his villa called Priory Place, in Wallingford, which he purchased soon after his marriage, though he had for some years before occasionally resided at it.

His connexion with this town, both from his office of Recorder, and his more or less frequent residence there from about the year 1750, led him to form and promote every plan which could contribute to its benefit or improvement. To his activity it stands indebted for two new turnpike roads through the town, the one opening a communication, by means of a new bridge over the Thames at Shillingford, between Oxford and Reading, the other to Wantage, through the vale of Berkshire*. What substantial advantage the town of Wallingford derived from hence will be best evidenced from the gradual increase of its malt trade between the years 1749 and 1779, extracted from the entries of the Excise-Office during that period, as contained in the note below†.

To his architectural talents, his liberal disposition, his judicious zeal, and his numerous friends, Wallingford likewise owes the rebuilding that handsome fabric, St. Peter's Church.

These were his employments in retirement. In London his active mind was never idle, and when not occupied in the duties of his station, he was ever engaged in some scheme of public utility. The last of this kind in which he was concerned, was the

* He was ever a great promoter of the improvement of public roads. The new western road from Oxford over Botley Causeway was projected, and the plan of it chiefly conducted by him. He was the more earnest in this design, not merely as a work of general utility and ornament, but as a solid improvement to the estate of a nobleman, in settling whose affairs he had been most laboriously and beneficially employed.—*Note to First Edition.*

† An average account of the number of net bushels of malt made in Wallingford from Midsummer 1749 to Midsummer 1779, inclusive:

Average of 5 yrs. ending Midsummer 1754	48,179
Do. . . of do.	1759 58,676
Do. . . of do.	1764 97,370
Do. . . of do.	1769 101,086
Do. . . of do.	1774 113,135
Do. . . of do.	1779 107,254

—*Note to First Edition.*

act of Parliament for providing detached houses of hard labour for convicts, as a substitute for transportation.

Whether the plan may, or may not succeed equal to his wishes and expectations, it is yet an indisputable proof of the goodness of his heart, his humanity, and his desire of effecting reformation, by means more beneficial to the criminal and the community, than severity of punishment. All human schemes, like all mechanical inventions, generally in practice fall short of the theory; and although this should fail, yet who can read the following quotation from one of his charges to a county grand jury relative to that act, without applauding the intention, and reverencing the public virtue of those who planned it:—

“ In these houses,” says he, “ the convicts are to be separately confined during the intervals of their labour, debarred from all incentives to debauchery,—instructed in religion and morality,—and forced to work for the benefit of the public. Imagination cannot figure to itself a species of punishment in which terror, benevolence, and reformation are more happily blended together. What can be more dreadful to the riotous, the libertine, the voluptuous, the idle delinquent, than solitude, confinement, sobriety, and constant labour? Yet, what can be more truly beneficial. Solitude will awaken reflection; confinement will banish temptation; sobriety will restore vigour; and labour will beget a habit of honest industry: while the aid of a religious instructor may implant new principles in his heart; and when the date of his punishment is expired, will conduce to both his temporal and eternal welfare. Such a prospect as this is surely well worth the trouble of an experiment.”

It ought not to be omitted, that the last augmentation of the Judges' salaries, calculated to make up the deficiencies occasioned by the heavy taxes they are subject to, and thereby render them more independent, was obtained in a great measure by his industry and attention.

In this useful and agreeable manner he passed the last ten years of his life, but not without many interruptions by illness. His constitution, hurt by the studious midnight labours of his younger days, and an unhappy aversion he always had to exercise, grew daily worse: not only the gout, with which he was frequently, though not very severely, visited from the year 1759, but a nervous disorder also, that frequently brought on a giddiness or vertigo, added to a corpulency of body, rendered him still more unactive than he used to be, and contributed to the breaking up of his constitution at an early period of life.

About Christmas, 1779, he was seized with a violent shortness of breath, which the Faculty apprehended was occasioned by a dropsical habit, and water on the chest. By the application of proper remedies, that effect of his disorder was soon removed, but the cause was not eradicated; for on his coming up to town to attend Hilary Term, he was seized with a fresh attack, chiefly in his head, which brought on a drowsiness and stupor, and baffled all the art of medicine; the disorder increasing so rapidly, that



gion was pure and unaffected, and his attendance on its public duties regular, and those duties always performed with seriousness and devotion.

His professional abilities need not be dwelt upon. They will be universally acknowledged and admired, as long as his works shall be read, or, in other words, as long as the municipal laws of this country shall remain an object of study and practice: And though his works will only hold forth to future generations his knowledge of the law, and his talents as a writer, there was hardly any branch of literature he was unacquainted with. He ever employed much time in reading, and whatever he had read, and once digested, he never forgot.

He was an excellent manager of his time, and though so much of it was spent in an application to books, and the employment of his pen, yet this was done without the parade or ostentation of being a hard student. It was observed of him, during his residence at college, that his studies never appeared to break in upon the common business of life, or the innocent amusements of society; for the latter of which few men were better calculated, being possessed of the happy faculty of making his own company agreeable and instructive, whilst he enjoyed without reserve the society of others.

Melancthon himself could not have been more rigid in observing the hour and minute of an appointment; during the years in which he read his lectures at Oxford, it could not be remembered, that he had ever kept his audience waiting for him, even for a few minutes. As he valued his own time, he was extremely careful not to be instrumental in squandering or trifling away that of others, who, he hoped, might have as much regard for theirs, as he had for his. Indeed, punctuality was in his opinion so much a virtue, that he could not bring himself to think perfectly well of any, who were notoriously defective in it.

The virtues of his private character, less conspicuous in their nature, and consequently less generally known, endeared him to those he was more intimately connected with, and who saw him in the more retired scenes of life. He was, notwithstanding his contracted brow, (owing in a great measure to his being very near-sighted), a cheerful, agreeable, and facetious companion. He was a faithful friend; an affectionate husband and parent; and a charitable benefactor to the poor; possessed of generosity, without affectation, bounded by prudence and œconomy. The constant accurate knowledge he had of his income and expenses (the consequence of uncommon regularity in his accounts) enabled him to avoid the opposite extremes of meanness and profusion.

Being himself strict in the exercise of every public and private duty, he expected the same attention to both in others; and, when disappointed in his expectation, was apt to animadvert with some degree of severity, on those who, in his estimate of duty, seemed to deserve it. This rigid sense of obligation, added to a certain irritability of temper, derived from nature, and increased in his latter years by a strong nervous affection, together with his countenance and figure, conveyed an idea of sternness, which oc-

casioned the heavy, but unmerited, imputation, among those who did not know him, of ill-nature; but he had a heart as benevolent and as feeling as man ever possessed.

A natural reserve and diffidence which accompanied him from his earliest youth, and which he could never shake off, appeared to a casual observer, though it was only appearance, like pride; especially after he became a Judge, when he thought it his duty to keep strictly up to forms, (which, as he was wont to observe, are now too much laid aside), and not to lessen the respect due to the dignity and gravity of his office, by any outward levity of behaviour.

In short, it may be said of him, as the noble * historian said of Mr. Selden; "If he had some infirmities with other men, they were weighed down with wonderful and prodigious abilities and excellences in the other scale."

It is now necessary, as at first proposed, to say something of the work here offered to the public.

That it is the genuine offspring of Mr. Justice Blackstone's pen, and compiled entirely by himself from his own notes (except in one instance that shall be mentioned) there can be no doubt. It is contained in five large Note-books, all written with his own hand; and prepared for the press, even to an Index, and a Table of Matters. These he still continued to carry on, as he added in each Vacation what he had collected in the preceding Term. The work reaches down to the end of Michaelmas Term, 1779, the last in which he regularly attended his Court; his illness confining him at home the greatest part of Hilary Term, 1780. And as there is no doubt of its being genuine, neither can there be any of his intention that it should be published; for, by a clause in his will he directs, "That his Manuscript Reports of Cases determined in Westminster Hall, taken by himself, and contained in several large Note-books be published after his decease.—And that the produce thereof be carried to, and considered as part of his personal estate."

This last part of the clause the editor here inserts, as an excuse for not making any presents of the work; which he does not think himself justified in doing, as trustee for the author's children, to whose emolument the profits are specifically directed to be applied.

The reader must not expect in the first volume a regular series of reports of the determinations of any one Court, or without breaks and interruptions in respect to time.

They seem to be only such, as he had selected out of many from his rough notes, either as being of a more interesting nature, or containing some essential point of law or practice, or perhaps, such only (particularly for the first few years) as he had taken the most accurate notes of. Far the greatest part of those contained in the first volume are of the Court of King's Bench, but there are some of the Courts of Chancery, Exchequer, and Exchequer Chamber on appeal.

* The Earl of Clarendon.

They begin with Michaelmas Term, 1746, in which he was called to the Bar; and there are some of every Term, except two, to Michaelmas, 1750, from whence there is an interval to Michaelmas, 1756, without one. The reason of this, most probably, is, that during that period he resided chiefly at Oxford, and had much of his time taken up in composing his Lectures, which he began to read in 1753, and in preparing for which he had been for some years before principally employed. This accounts for his want of leisure to revise such rough notes as he might have taken during that period, and to fit them for publication, while they were fresh in his memory. In the three following years he attended the Bar only in Michaelmas and Hilary Terms, on account of his Lectures; consequently there are, among these Reports, none of the Easter and Trinity Terms of those years; but from thence they continue in a regular series, except one Term, when he was indisposed*, and the two Terms immediately preceding his being promoted to the Bench, when he attended the Court of Exchequer only†. Which circumstances sufficiently evince that these Reports were all (except one) taken by himself. That one, is of the arguments of Sir Thomas Clarke, Master of the Rolls; Lord Mansfield, Chief Justice of the King's Bench; and the Lord Keeper Henley, delivered in the Court of Chancery, in Hilary Term, 1759, on determining the interesting cause of *Burgess and Wheate*, and which, as appears by a remark subjoined to it, was communicated to him by that great and able lawyer, Mr. Fazakerly; but was all transcribed in his own hand. The Editor hopes the arguments are reported correctly; but as they are only a copy, probably from a copy made by a clerk, it is possible there may be some errors in them, which the candid reader will excuse; and lament with him, that by the dreadful conflagration at the house of the Noble Lord above mentioned, in June last, a correct note of that argument was lost, among his other very valuable manuscripts, which his Lordship had in the most obliging manner given permission to the Editor to examine Sir William Blackstone's Note-book with, and correct any errors that might be found in it. For this mark of esteem for his late departed Brother, and the kind manner in which it was offered, the Editor thinks himself happy in having an opportunity of publicly expressing his own, and the family's most grateful acknowledgments.

Fortunately for those whose interest is concerned in this publication, and (it may perhaps be added without impropriety) for the public too, the manuscript Note-book containing this report escaped the same fate. It was delivered, a few days before, by the Editor to Mr. Justice Ashhurst, to communicate to Lord Mansfield, and happily had not been sent to him.

The state the Editor found this work in, greatly alleviated the trouble attending the publication; but as he had reason to think, the learned Judge had not given it the last revisal he intended, he has thought it his duty, before he made it public, to read the whole

* See page 627.

† See page 681, vol. 2.

over with the utmost attention, and to correct any literal errors or omissions, which the most accurate writer may be liable to.

It has afterwards gone through a second revision by a gentleman of the profession, who, at the Editor's request, undertook to examine the quotations from reports, and other authors, in order to give to the world as complete a copy as possible, and that nothing might appear, throughout, unworthy of the Compiler.

How far he has succeeded in that attempt, the Editor must leave to the determination of the candid reader. As the work of Mr. Justice Blackstone, he has no doubt but it will be received by the gentlemen of the profession, for whose use it was intended, with a particular degree of regard.

Whatever errors may be found in the publication, he takes the demerit upon himself, hoping that the merit of the work will atone for any defects on his part, and that due allowance will be made for the Editor's total ignorance, till now, of the business of publication;—a task he did not undertake as a volunteer, or as thinking himself peculiarly qualified for, but as being called upon to engage in it, not only as a labour of friendship, but as a duty incumbent on him, as executor to the Author, and guardian of his infant children.

BOSTON HOUSE,
Feb. 20, 1781.

JAMES CLITHEROW.

AN

ALPHABETICAL INDEX

OF

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CONTAINED

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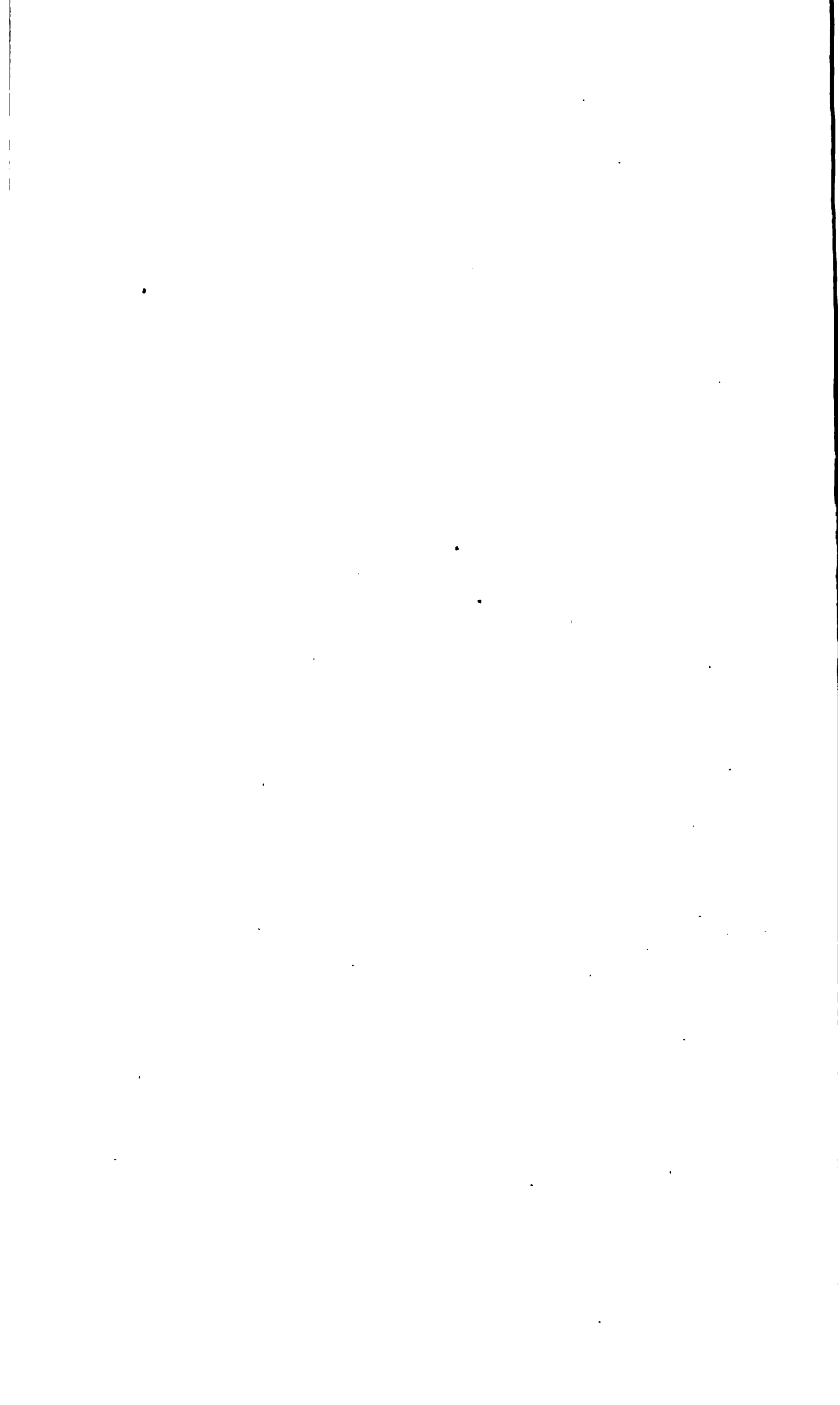
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R E P O R T S

OF

C A S E S.

MICH. TERM,—20 GEO. II. 1746.—KING'S BENCH.

HANKEY v. TROTMAN.

MOTION for a new trial. Plaintiff was a banker; had a bill on defendant; for which the defendant gave him a bill on another banker, at twelve at noon, who stopped payment before the next morning. The question was, Whether plaintiff or defendant should stand to the loss; or whether there was any laches in the plaintiff, who got the bill marked for acceptance the same night. On the trial, the jury found a verdict for the defendant.

No new trial where the verdict is neither against evidence nor law. No time prescribed by law for the receipt of bills of exchange.

Sir John Strange, Sir R. Lloyd, and Mr. Ford, argued for the plaintiff, that he endeavoured to receive the bill as soon as in the common course of business it used to be received; and that some time must be allowed for the circulating paper credit.

Mr. Hume Campbell and Stracey, contra, laid it down that a trading jury was the best judge of this case, and had not gone against law in this verdict, the law not having prescribed any time for receiving bills; and that the Court was not to interpose, unless the jury was manifestly wrong.

Per Cur. LEE, C. J.—I was of opinion for the plaintiff at the trial, though there was variety of evidence; but doubt whether the verdict can be set aside, as it is a question of * fact, whether there was convenient time allowed for receiving [* 2] the money.

WRIGHT, J.—The jury is the proper judge of circumstances and facts. But the question here is, Whether the plaintiff had any time at all. Some time must be allowed: Therefore I doubt whether the verdict is not against evidence, imputing laches to the plaintiff where there was none.

DENISON, J.—Both juries and Judges have been of different sentiments as to this point. The question is, Whether the

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plaintiff has used a reasonable diligence or no. This the jury are to judge of. There certainly was time, though by incidental circumstances it was very strait. The precedent would be dangerous to set aside a verdict, which is neither against law nor evidence.

FOSTER, J.—Reasonable time is what is sufficient to receive it in. The verdict is not against evidence. Bankers have no right to establish a customary law among themselves at the expense of other men.

Rule *nisi* for a new trial discharged (a).

(a) This case has been overruled in that of *Appleton v. Sweetapple*, Bayley on Bills, 106 (3rd ed.) There, a bill payable in London on demand was given to the plaintiff in London at one o'clock in the afternoon, and he did not present it till the next morning; the question was, Whether he presented it in time. Lord Mansfield left the point to the jury, who found for the defendant; but the Court granted a new trial, because the question was a matter of law, upon which the Judge should

have decided. The jury found again for the defendant, but against the Judge's direction. A second new trial was granted, and the jury again found for the defendant; and then the Court refused to interfere. This is recognised in *Robson v. Bennett*, 2 Taunt. 388, where it was held sufficient, that a check should be presented the day next after that on which it is received: *S. P. Metcalfe v. Hall*, Bull. N. P. 276; *Rickford v. Bidge*, 2 Camp. 537. See *Dagglish v. Wetherby*, post, 747.

THE KING v. SPRIGGINS.

Information for pretending to read the Riot act, denied.

MOTION for an information. Spriggins had mortgaged a cop-pice: the executor of the mortgagee employed men to cut it down. The mortgagor, not being a magistrate, read a paper which he said was the King's proclamation against riots; but it not being proved to be so, no information was granted (b).

(b) See *R. v. Inh. of Wigan*, post, 47; *R. v. Robinson*, post, 541.

HALE v. CASTLEMAN.

Altering a sheriff's warrant no ground for an attachment, unless an ill use made of it.

[* 3]

THE plaintiff's attorney had inserted in the sheriff's warrant to arrest the defendant another name, besides those whom the sheriff had directed it to, and who arrested defendant. On the sheriff's complaining of this, the name was erased; but the attorney swore, not by him. *Wright, J.*, was of opinion to grant an attachment for this; but *Lee, C. J.*, **Denison* and *Foster, Js.*, though they disapproved of the thing, yet thought an attachment too hard, as no ill use had been made of the warrant (c).

(c) If a warrant be altered by the insertion of a name, an arrest thereon is illegal; *Burslem v. Ferne*, 2 Wils. 47; *Hou-*

sin v. Barrow, 6 T. R. 122; and see *Boyd v. Durand*, 2 Taunt. 161.

THE KING v. CHARLES RADCLIFFE.

S. C. 1 Wils. 150; Post. Cr. L. 40.

THE prisoner was attainted of high treason in 1716, for being in that rebellion, and had escaped out of Newgate (it was

thought by connivance, being the younger brother of the Earl of Derwentwater, who was then executed), and had entered into the French service. During the late rebellion he was, with other French officers and troops, taken at sea on board a ship said to be bound for Scotland, and confined in the Tower till this Term; when the *Attorney-General*† on the 19th of November moved for a *habeas corpus* to bring him to the Bar of this Court, and he was accordingly brought up by General Williamson, the deputy-lieutenant, on the 21st of November.

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† (Ryder.)

At his first appearance he, with some levity and indecency, disclaimed the jurisdiction of the Court, as being a subject of the King of France, whose commission he had borne these thirty years; claimed the benefit of the cartel between England and France, and demanded that his commission might be read: but the Court told him, that could not be done. He was then called to, to hold up his hand; which he refused to do; which the *Attorney* observed to be a mere point of form, and therefore insisted he should be arraigned without it. *Lee, C. J.*, then desired the prisoner to comply with it, as a usual ceremony; but he refused, saying, if it was a mere point of form, it might well be dispensed with in a stranger; if a point of moment, he was determined to do nothing that might argue a submission to the jurisdiction(*d*). It was then demanded of him, What he had to say why sentence of execution should not be awarded against him according to his former judgment; and was informed that, unless he answered, sentence would immediately be awarded. He then *desired counsel to be assigned him, to advise him what plea to rest upon. And, at his desire, Mr. *Ford* and Mr. *Jodrel* were accordingly assigned him: who desired time to prepare themselves. And the Monday following, the 24th of November, was fixed to bring him up again.

Court will take no notice of commission from a foreign prince.

Arraignment seems holding up the hand.

[* 4]

A rule was then moved for, to admit the counsel to have access to the defendant, now a prisoner of this Court, but Mr. *Attorney* objected to it; unless leave was previously obtained from the Secretaries of State. But Mr. *Solicitor (Murray)* informed the Court that he was told, the Secretaries had already given orders for that purpose. Whereupon the Court said, then there was no occasion for any rule, and so none was granted.

Rule not granted for access of counsel to a state prisoner.

November 24.—The prisoner was brought into Court, and there immediately began reading the cartel, which stipulated that all officers, *of what nation soever*, shall (if taken) be exchanged, &c. But the Court took no notice of this, and demanded as before, What he had to offer, &c. To which after some delays he at last answered (without holding up his hand) that he was not the person mentioned in that record. Mr. *Attorney* then averred that he was; and issue being thus joined, a jury was called to try it at the bar *instantan* (*e*).

(*d*) Holding up the hand is not necessary in the case of a peer; neither is it absolutely necessary in the case of a common person; 2 Hale P. C. 219, n. (*a*); Lord *Delamere's* Ca., 4 Harg. St. Trials, 211; Lord *Mohun's* Ca., Id. 512; Lord *Stafford's* Ca., T. Raym. 408.

(*e*) 4 Bla. Comm. 396; *R. v. Corbet*, 1 Sid. 72, 1 Lev. 61, 1 Keb. 244, Kelyng, 13; *R. v. Rogers*, 3 Burr. 1809. See *Copp. Dig. Justices* (W. 2.) and the form of the entry of a trial *instantan*, 4 Bla. Comm. App. v.

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No putting off
a trial on a col-
lateral issue, un-
less the defend-
ant will purge
himself of the
accusation by
affidavit.

The prisoner's counsel then moved for farther time; and an affidavit was sworn in Court by the prisoner, under the name of Count de Derwentwater, setting forth that two witnesses who were mentioned by name, and who could prove he was not the person they would have him to be, were now at Brussels; but would come over if sufficient time was allowed to send for them.

The King's counsel (*viz.* Mr. Attorney, Sir John Strange, Mr. Solicitor, and Sir Thomas Bootle) objected to this; unless the prisoner would absolutely and directly swear, he was not the Charles Radcliffe who was attainted in 1716: alleging, 1. That this was a collateral, not an original, issue. The fact to be tried was, not whether he was guilty of treason, but whether he was the person formerly attainted thereof. In original issues it is usual to stay trial on such suggestions; but in collateral ones, the trial is always *instantier*. 2. That by requiring such positive oath from the prisoner, no injury can possibly be done to him. If he is the traitor formerly convicted, he deserves no indulgence: if he is not, he may safely swear it. If the prisoner will not swear it; the Court will conclude him to be the person, and so shew him no favour.

To this it was replied by the counsel for the prisoner, that he had been confined for more than a year without being brought to trial, or knowing what charge would be brought against him. That the Crown had taken this whole twelvemonth to seek after evidence; and would not allow the prisoner a Term, nor even a week, or a day. For though notice of his being brought up was given to the prisoner on the 10th instant; it was countermanded the next day, and no fresh notice given till the night before he was brought up. As to the first objection; allowing a distinction to be sometimes taken between original and collateral issues, it could hardly be admitted here. For if the prisoner be not the person attainted (which must yet be supposed) then with regard to him the issue is indeed an original one: For it is the first time that he has been called to answer the charge against him: His fortune, liberty, and life, are equally in jeopardy now, as if he had been indicted of high treason; and he is entitled to the same indulgence in order to save them. The condition of foreigners would be extremely hard, and the English nation be odious to all the world, if we were to set a precedent of taking a man on the high seas, bringing him to England, charging him with a former conviction thirty years ago, and (when he begs time to fetch his witnesses from beyond sea, in order to clear himself) telling him it is the custom of our Courts, to proceed to the trial of such collateral issues *instantier*. As to the second objection; it is a maxim in our law, *Nemo tenetur seipsum accusare* (e). To demand an oath of this nature is in fact to force the prisoner (if guilty) into a self accusation, by his silence; or else into perjury, by taking it. It is true,

were he innocent, it could not hurt him: But one might, with equal propriety, object to postponing a trial on an original issue of felony or treason, unless upon the same conditions; which

conditions have an inevitable tendency to overturn that fundamental maxim aforesaid. As therefore it is allowed that in those cases a trial may be postponed, upon such an affidavit as the present, they hoped the present case was within the same reason (f).

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Sed per tot. Cur.—Unless the prisoner will make a positive affidavit, as required by Mr. Attorney; the trial cannot be put off. Which he refusing to do, a jury was impaneled on the spot by the under-sheriff of Middlesex, who attended for that purpose.

The prisoner was allowed no peremptory challenges (g) to the jury (though he demanded that liberty) on the authority of Lord Hale P. C. (h), who says (as cited by Mr. Attorney) that in collateral issues no peremptory challenges are allowed. N. B. He immediately subjoins the reason; because in such issues the party's life is not in jeopardy.

No peremptory challenges in collateral issues.

On the part of the Crown four witnesses were produced, of whom the principal was General Williamson; who swore, that the prisoner had in conversation confessed, that he was the person in question; and that he had escaped out of Newgate, and told him the manner of his doing it.

On the part of the prisoner no witnesses were produced, but Mr. Carpentier, envoy from the King of the Two Sicilies; in order to prove how long he had been in the French king's service: but he was not permitted to enter into evidence on that head. However he desired Mr. Carpentier to bear witness of his frequent protests against the jurisdiction of the Court.

The counsel for the prisoner observed upon the evidence to the jury: after which, the *Attorney-General* (contrary to all practice, as no evidence was given by the prisoner) insisted and was permitted to reply. In which, he informed the jury of the * prisoner's refusal of the oath which was tendered to him; and this he insisted was the strongest proof of his guilt. As this was first mentioned in the reply, his counsel had no opportunity of explaining that matter to the jury: Who, after withdrawing from the bar about three minutes, found a verdict; that the prisoner was the same Charles Radcliffe who was indicted and convicted in 1716.

Attorney General may reply with new matter, in collateral issues, though
[* 7]
no evidence given for the prisoner.

A faint attempt was afterwards made to plead the act of grace, 7 Geo. I. in stay of execution, but the foundation of the plea being very slender, it was dropt. And the prisoner at the bar, by the name of Charles Radcliffe, was ordered for execution on Monday the 8th of December, at the suggestion of Mr. Attorney; who observed, that two Sundays would have intervened, which was the usual practice at the Old Bailey. The prisoner took his leave of the Court, with this speech; "I hope your Lordship will allow me time enough to send to Lord Morton (then a prisoner) at Paris; for we are to set out upon the

(f) See *R. v. D'Eon*, post, 510; and Lord Kenyon's observations on this case, post, 513, n.

(g) 4 Bla. Comm. ubi sup.; Harg. Co.

Lit. 157 b. (note 285); 2 Hawk. P. C. c. 43, s. 6; Staund. P. C. 163 a.

(h) Vol. ii. 267.

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same journey together." He was accordingly beheaded on Tower-hill on the day appointed by the Court.

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HILARY TERM,—20 GEO. II. 1747.—K. B.

POWEL v. LITTLE.

Payment to the plaintiff's late attorney, changed without leave of the Court, will be good.

THE plaintiff had privately countermanded his attorney in this cause. The defendant afterwards pays him the debt in dispute, for the use of the plaintiff. And the Court held it a good payment; because the attorney was changed, without leave obtained from the Court (a).

(a) But payment to an agent, employed to sue by plaintiff's attorney, is not payment to the plaintiff; *Yates v. Freckleton*, 2 Doug. 623: see *Morton's Ca.* 2 Show. 139; *Kaye v. Demattas*, post, 1322.

IN THE EXCHEQUER CHAMBER.

HOLDBAST on demise of ANSTY v. DOWSEN.

V. Strange,
1253.

[* 9]

JOHN THOMPSON being seised in fee, by his last will devises lands to Dowsen for life; with remainder to his issue in tail: He also devises a legacy of 10*l.* each to John Hales, and Elizabeth his wife, and an annuity or rent-charge for life to Elizabeth Hales, to her separate use, charged on his real and personal estate; which he also charges with the payment of all his legacies. John Hales was a subscribing witness to the will; and after the death of testator, refused to accept his legacies of 10*l.* when tendered. Dowsen the devisee enters on the land, and Ansty the heir-at-law brought an ejectment to try the validity of the will. The jury found the facts above stated; and the Court of King's Bench determined in favour of the plaintiff, that the will was not properly attested by three credible witnesses; on account of the interest of John Hales. Dowsen brought a writ of error in the Exchequer Chamber, * where it was argued the 10th of February, the 18th of February, and the 3d of March, 1746.

Sir *John Strange* for Ansty, the defendant in error.—The law is jealous of the credit of judges, officers, jurors, and witnesses. Judges cannot judge in their own county. Various exceptions are allowed to sheriffs, &c. Various challenges to jurors, who are to be *omni exceptione majores* (b). The law is no less jealous of witnesses, especially with regard to devisees. By common law, no estate greater than for term of years was deviseable by will; Co. Lit. 111 b; Wright Ten. 172, 173, 174. When uses were introduced, uses were devised, Plowd. 302 b,

(b) Co. Lit. 156 a.

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and *cestuy que use* could compel the execution. By the statute of Uses, 27 Hen. 8, the possession was drawn to the use, whereby uses were no longer deviseable. The stat. 32 and 35 Hen. 8, gave leave to devise, in writing made during the life of the deviser, two thirds; which the stat. 12 Car. 2, extended to the whole of his estate: Then came the stat. 29 Car. 2, which the preamble declares to be a guard against fraud. By construction of the 32 Hen. 8, bare notes in another's hand-writing were allowed as wills; Anders. 34; Keilw. 209; Dyer, 72; Cro. Eliz. 100. The present statute adds signing either by the party, or by some other person in his presence, or by his express (*i. e.* verbal) direction. Sealing is no signing within the act, 3 Lev. 1; though the name wrote at the beginning in the testator's own hand is; 3 Rep. 36(c). The statute also requires attestation and subscription by witnesses that they may be certain of the instrument which they attest: And this in the presence of the testator. They must also be three credible witnesses (d). *A man may be a credible person, though not a credible witness. Hales is an interested witness. His wife has a rent-charge on the lands devised. His legacy is also charged on both real and personal estate; and the jury have not found the personal to be fund sufficient. He who is to gain by the will, is not the credible witness meant by the act, and Lord Hale who penned it. The word credible is not added in the next clause of the act, touching revocations; because less solemnity is necessary to reinstate the heir than to disinherit him (e). In a parol will, the devisee could not be a witness, Styl. 370: and shall he be allowed in a written one according to the statute? A witness cannot be credible if liable to suspicion. *Lea and Libb*, Carth. 35 (f), Two witnesses to a will, and two others to a codicil, not allowed to be three put together; Hil. 16 Geo. 2, *K. and Sergison* (g). The stat. W. 3, of deer-stealers, and the stat. Ann. concerning game, mention credible witnesses. It was determined, 6 Geo. 2, that partakers of the poor's rate were not so, because they have a share in the penalties. At what time must the witness be credible (h)? At the time of attestation; not when he is called to prove the will. Were he to release his own legacy, and wife's annuity, he would not be a credible witness. Suppose a certain age or

[*10]

Qu. ? Vide P. 97.

(c) See *Coles v. Trecothick*, 9 Ves. J. 248.

(d) Devises are to be attested and subscribed in the presence of the testator, by three or four credible witnesses. The term "credible" is to be construed in this passage as synonymous with "competent;" per *Willes*, C. J. in *Pendock v. Mackinder*, *Willes*, 666. *Ld. Mansfield* thought the word "credible" inaccurate, as to which see *Wyndham v. Chetwynd*, 1 Burr. 418, 419, and post, 98. S. C. See also *Hindson v. Kerooy*, 4 Burn's Eccl. L. 97 (7th ed.); *Bettison v. Bromley*, 12 East, 350, and cases there cited; *Phipps v. Pitcher*, 6 Taunt. 220, and *Loose v. Jolliffe*, post, 365.

(e) Since the statute of frauds, a will

cannot be revoked, but by an instrument executed according to the solemnities required by that statute, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or by his directions: per *Ld. Mansfield* in *Burtonshaw v. Gilbert*, 1 Cowp. 49, 52; see 1 Doug. 244, n. (3), and *Clymer v. Littler*, post, 345; also *Onions v. Tyrer*, 1 P. Wms. 343, and some observations on this case in 1 *Powell on Devises* (edit. by Jarman), pp. 591, 593.

(f) 3 Mod. 263, 1 Show. 69, S. C.

(g) 2 Stra. 1181.

(h) *Pryce v. Lloyd*, 1 Ves. Sen. 503, 2 Ves. Sen. 374; *Glyn v. Bank of England*, 1d. 42.

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[*11]

dignity were requisite to qualify a witness, must not that be at the time of attestation? Can a child be a witness and prove it when grown up? It is not in the power of a legatee to determine, who shall have the estate, by accepting or refusing his legacy. By the civil law, the witnesses must be credible *cum signarent*, C. 6, 23, 1. Suppose a witness becomes infamous, that does not vacate the will, but he shall be considered as dead; *Jones* and *Mason*, P. 2 Geo. 2 (i), allowed on Ward of Hackney's being witness to a bond. **Hillyard* and *Jenyns*, 1 Ld. Raym. 505, Comyns 91, 94, Carth. 514, Cas. temp. W. 3; a devisee in remainder was witness to a will, and not allowed.

Objection.—Hales is a good witness, *quoad* the devise to the defendant; for in the case in Carthew, the devise is bad to the witness, and he is a bad witness to that devise. So says the book. But there were no other lands devised in the will, than those to Hillyard. Answer.—Hales would not be a credible witness, even if his wife's annuity were charged on other lands; 3 Mod. 263. A witness must be credible *in toto*, or not at all. Suppose four estates devised to four different persons, who all witness the will. Are they credible witnesses to each other's respective devises, and not to their own? There is only one instance where the statute has been loosely construed. Salk. 688; 1 Ld. Raym. 507, the attestation in the testator's presence allowed to be sufficient, by a possibility of seeing through a glass door (k). But this was at the testator's particular request.

[*12]

Serjeant *Prime* for Dowsen, the plaintiff in error.—We are not to be bound by the nice scruples of the civil law, with respect to witnesses; nor indeed is civil law so nice in testamentary cases as supposed. Domat. 2, 3, 1, 3, 8, 9, 10. *Hæres non, legatarius potest esse testis*. By *hæres* is meant the *hæres factus*, or executor (l). A small legacy is no objection to a witness; 1 Mod. 254. In a devise to the poor of a parish, inhabitants are allowed to be witnesses, 2 Sid. 109; *De minimis non curat Lex*, F. N. B. 107. Elizabeth Hales' annuity is not in the power of the husband. His interest therefore is very small. Domat, in the same section, says, an executor may be a witness, if he did not know the contents of the will. **Swinburn*, 4, 64, 11. Godolph. O. L. 67. The testimony of a legatee may be good for the rest of the will, though not for his own legacy. As to 3 Lev. 1, the practice is now otherwise at Nisi Prius. Where a new clog is laid on devises, as, by the stat. 29 Car. 2, the Court will not enlarge the meaning of the

(i) 2 Str. 833. Where the plaintiff was the only surviving witness, and also administrator *de bonis non* of the obligee, proof of the hand-writing of the obligor was allowed; *Godfrey v. Norris*, 1 Stra. 34. So an executor; *Goss v. Tracy*, 1 P. Wms. 289. But where the witness was interested at the time of attestation, and also of the trial, there proof of hand-writing not allowed: the Court distinguishing

that case from the preceding; *Swire v. Bell*, 5 T. R. 371.

(k) In favour of attestation it is presumed, that if the testator might see, he did see. But where the devisor cannot by possibility see the act doing, that is out of his presence; *Doe v. Manifold*, 1 M. & S. 294.

(l) As to this point see Harris' Justinian, Lib. II. Tit. X. Sect. III.

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words. On the statutes of hue and cry, the plaintiff may be a witness; and credible if the jury think proper. Here too, the statute of frauds requires a witness generally; whether credible must be determined by a jury. It is true, that a commoner cannot be a witness as to rights of common; Hob. 92 (m). But it is his own right that is trying. So of parishioners with respect to a modus. As to the time of the witness being credible: 1 Ld. Raym. 730, Salk. 691, legatees were admitted to be witnesses, having received or released their legacies. 1 Sid. 315, a legatee may be a witness; though he makes over his legacy, even pending trial. *Lea* and *Libb* proves nothing to the present purpose. Tender and refusal of a legacy amounts to an absolute renunciation of it; and besides, here the real estate is only chargeable with legacies conditionally, if the personal is not sufficient. A will may be good in part. Thus a devise of all lands was void by the stat. 32 Hen. 8; as to one third only, but good as to the remaining two thirds. If a disseisee enters on part only of the land disseised, his will will be good *pro tanto*. If a devisee of land dies, living the testator, a devise to the remainder-man is good. *Maxim: *Opinio quæ favet testamento est tenenda*. No suspicion of fraud in this case. *Qu.* What interest has Hales? If Dowsen gets the estate, how will he get his annuity? Will he distrain? If he does, he can't avow under the will; for we admit he cannot be a witness to prove his own rent-charge. Godolph. 455, 459. Swinburn, 7, sect. 20, 21. Testator, by making Hales a witness, shews he meant to revoke his legacy. It is an implied revocation. For wills must be so construed as to make them stand entirely if possible. If two directly opposite designations in same will, the latter must stand. The testator must be supposed to know the statute; therefore by calling Hales as a witness, who was before a legatee, which capacities are wholly inconsistent with each other, he virtually rescinds the legacy. The attestation is an essential part of a will, as well as of a deed. Hence it follows, that the will is good with respect to every body but John Hales. The case of *Oxenden* and *Penrice* (n) does not interfere with this argument. As to the case put, of four witnesses to a will containing four different devises, one to each witness respectively; there three come to support the devise to the fourth subscribing witness. That not the case here. Plaintiff in error no witness to the will. The rule is, that a legatee cannot be a good witness, *quoad* himself or any other witness. See Godolph. 67. And then each witness must lose his own legacy of course, to qualify himself to be a witness.

[*13]

Mr. *Gundry* for defendant in error.—The legacies are in law the same as if both to John Hales. No distinction of property between husband and wife. The annuity is also the husband's; he might distrain and avow for it. If Hales therefore is competent and credible, *who is not? Judges can never have abso-

[*14]

(m) See Stark. Ev. Part IV. p. 391.

(n) 2 Salk. 691.

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lute certainty of facts; that arising from a man's own mind.—Seldom demonstration: for the medium must be clear to constitute that; and the medium is usually a thing to be tried.—On such trial, written evidence is the best kind, and parol will seldom be admitted where the other can be had. Among parol evidence, no interested witness can be admitted, though he is interested illegally or consequentially only. Where an interested witness is forward to prove a deed, he is to be the more suspected. Interested witnesses have been rejected on the trial of commons and modus's. The objection of high antiquity; Co. Litt. 6; Salk. 283. Remainder-man expectant on an estate tail cannot be a witness, though his estate is in the power of another. Here, Hales is embarked in the same venture with the devisee. The question is the validity of the attestation, and surely Hales shall not be a witness to this. He is witness to the title of his own annuity. Styl. 370; Legatee no witness. 1 P. Wm. 10; Children of legatee witnesses to a will: will rejected by the delegates. 1 Ld. Raym. 730; Testator gave legacies to servants living with him at the time of his death: two servants witnesses; their testimony not good, though their interest uncertain at the time of subscribing. 6 Rep. 15 b, gives the reason why common law would not allow the devise of lands. Wills have introduced more fraud, roguery, and perjury, than any other conveyance. Rogues think to compound for their villanies by giving donations to hospitals, &c. Misers grow more tenacious in their lives, as they know they can give when they die. It is a mistaken notion, that of favouring the *execution* of wills; the favour is due to the *contents*. * Courts of justice should not refine on the statute of frauds; for such refinements would let in the mischiefs which the statute was meant to prevent. The act is a sure guide. *Lea and Libb* shews the strictness wherewith this act has been construed. Departing from the statute in favourable cases, may be a precedent in those which are not so. *Three* witnesses is the *degree* of evidence which the act requires. *Two* may swear true, and so may *one*; but the evidence is not so credible. Hales is no witness, even with respect to Dowsen; being under an undue bias. The case in 2 Roll. Abr. 685, where four were indicted for perjury and admitted witnesses for each other, was in a personal cause; but Hales is to establish a deed. If by Hales's evidence the lands shall pass, the annuity must pass too. He is witness to the execution, which must extend to the *whole* will; for a will is an entire thing. A will cannot be good or bad, in part only, for want of due attestation. Shall a witness be competent as to part? Can any *one* devise be void for want of due attestation? The argument for a partial validity, drawn from the devise of lands in chivalry, proves the contrary of what it was alleged for; being still an entire will as to what the testator can dispose of. The distinction of a legatee's not being a good witness *quoad* his own legacy or that of any other witness, how is it grounded? This is only made to evade the case, and is a doctrine fruitful of absurdities. As to the revocation of legacy by calling the

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legatee to witness; testators are not supposed to know the law, and therefore the law is favourable to *contents* of wills. So that he cannot be supposed to have intended such revocation. Besides this is mere supposition against the clear words of the statute. * Witness must be credible at the time of attestation, as is plain from the words of the act. He cannot become credible afterwards by releasing or receiving his legacy, for that is confessing he was once not a credible witness.

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Serjeant *Prime* in reply.—Hales cannot avow, if he distrains for his annuity; for he must then prove the will. As therefore he can receive no present benefit from it, there is no present interest in him, nor in his wife during his life. Remainder-man after estate tail has an estate vested in him, while estate tail subsists; though tenant in tail may divest it afterwards. Therefore he is witness *in propria causa*. Pauper cannot be witness on prosecution upon the game law, because he is to receive the penalty. It is his own title that is trying. Styl. 370, is an anonymous note, no judicial opinion. Allowing that a witness must be competent *tempore signandi*, if he is only a witness to the execution, not the contents, as is said; what bias is he under? He would most naturally presume he was not interested in the will, because called to attest it. The law will not presume that he knows the contents. No authority cited to shew, that devisee or legatee may not be a competent witness *quoad alios*. Nor that a legatee, even though he has not released, may not be a good witness to the execution of a will. Nor that a legatee is entitled to his legacy by that will which he witnesses. A man may be supposed ignorant of the law, in order to forward his intent, not to defeat it. Godolph. 455, marg.; Litt. 368; Perk. 478; Plowd. 343, 344. An act done by a testator, repugnant to any part of a testament, is a repeal of that part of it. * Wills were a great accession to the people, as they delivered us from one of the bondages of feudal tenure; under which tenants were not suffered to dispose of their lands, because lords would lose their marriage, ward, and relief. Every devise is by the words of the statute supposed to be separate. Legatee cannot be a witness to the legacy of a brother witness; because the brother witness's legacy is by act of law rescinded also. In *Lea* and *Libb* it is only determined that *two* cannot be *three*; there were never three present at once. The question was, Whether a witness to a codicil, was so to the will; that is, whether he was absolutely a subscribing witness; not whether, supposing him a witness as Hales is, he was competent or credible.

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N. B. This cause, before judgment given, was compromised by the parties; but gave occasion to stat. 25 G. 2, c. 6(o).

(o) By which it is provided, s. 1, that if any person shall attest the execution of any will or codicil (to whom any beneficial devise, legacy, estate, interest, gift, or appointment affecting any real or personal estate, except charges on land, &c. for payment of debts, shall be given), such devise, legacy, &c. shall, so far only as concerns

such person attesting the execution, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the 29 Car. 2, c. 3, s. 5, notwithstanding such devise, legacy, &c. This act extends to a legacy though of personal property only;

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Lees v. Summersgill, 17 Ves. Jun. 508: but in *Brett v. Brett*, 3 Addams' Ecc. Rep. 222, Sir John Nicholls says, the decision in *Lees v. Summersgill* is bad, being founded on erroneous information given to the Mas-

ter of the Rolls (Sir Wm. Grant) as to the understanding and practice of the Ecclesiastical Courts in respect to this particular statute.

THE KING v. LORD VANE.

No information against a husband for endeavouring to retake his wife, contrary to articles.

LORD VANE married *A. D.* 1734. By the marriage settlement 400*l.* *per annum* pin-money settled on Lady Vane; to which Lord Vane added afterwards 300*l.* more. Soon after, she libelled him in the spiritual court for cruelty, but nothing done upon it (a). New articles were made *A. D.* 1737, reducing the 700*l.* to 500*l.* *per annum*, with covenant on the part of Lord Vane to permit her to go where, and when, and live with whom she pleased. They cohabited again; but she soon left him and went to Germany, whither he pursued her, but could not find her. He applies to Chancery, and obtains an injunction to suspend the articles. They cohabited again in 1744 (b), and he behaved very tenderly and went to Bath with her. In December she eloped again, grew very expensive, and kept bad company at Fernhall in Essex. In August 1746, he came there with two persons, armed only as travellers; got into the house, and endeavoured to persuade her to return to him, but to no purpose. She got away by stratagem, and locked him in. In September, he came and took forcible possession of the house. She moved for an information for this breach of the peace, contrary to the articles of 1737.

But *per* LEE, C. J., FOSTER and DENISON, Js.—Articles must be supposed articles of reconciliation, not of separation. This a strange clause to be inserted in such articles: we will not determine its validity by granting information; which cannot be done, without putting a criminal and scandalous construction upon it. Lady *Rawlinson's* case was very *different. If the articles are valid, there is a proper remedy by civil action (c).

Information denied.

(a) See *Lord Vane v. Lady Vane*, Barnard. C. R. 135, and *Whorewood v. Whorewood*, Finche's R. 153.

(b) It appears that Lady Vane had exhibited articles of the peace against her husband *propter sevitiem* in M. T. 1743, and that the security required was 1000*l.* for Lord Vane and his bail in 500*l.* each; 13 East, 171, n. (a); 2 Stra. 1202, S. C.

(c) A wife separated by articles in con-

sideration of money received by the husband, with covenants from him, cannot be seized by him or forced to live with him; *R. v. Meade*, 1 Burr. 542; *R. v. Lister*, or *Lady Rawlinson's Case*, 1 Stra. 478, 8 Mod. 22: see *R. v. Robinson*, *post*, 541, and *Head v. Head*, 3 Atk. 547. A party applying for an information must waive his right of action; *R. v. Sparrow*, 2 T. R. 198.

WALKHOUSE v. DERWENT and LARWOOD.

AT Norfolk Quarter-Sessions, an order of two justices relating to a case of bastardy was confirmed. Plaintiff was counsel for the order, defendants against it. They afterwards laid a wager, that the Court of K. B. would quash the order; and articles were drawn, by which the defendants agreed to bring a *certiorari* in order to try it. On default of so doing, the plaintiff brought an action on the articles. It was moved on behalf of the defendants, that the proceedings should be staid, and the articles delivered up.

Court will not decide wagers.

Per Cur.—We desire the gentlemen would make an end of it between themselves, and not let us hear any more of it, it being a very improper thing (*d*).

(*d*) In *Jones v. Randall*, 1 Cowp. 37, it was held, that an action lies to recover money won upon a wager, "Whether a decree of the Court of Chancery would be reversed or not on appeal to the House of Lords:" but Lord *Mansfield* said, if it had been laid with a lord of Parliament or a judge, it would have been void from its tendency; *Allen v. Hearn*, 1 T. R. 60.

The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest; *Henkin v. Gueras*, 13 East, 247, 2 Camp. 408. See *Brown v. Lesson*, 2 H. Bl. 43, and *Powell v. Knowler*, 2 Atk. 224.

THE KING v. WEBB.

WEBB was captain of a sloop of war, and had pressed Captain Wager, of a merchant ship, to serve as a common seaman. For this, an information was granted, because though pressing may be warrantable in national emergencies, yet Webb appears to have exceeded his power and to have acted maliciously.

Information for malicious pressing.

SPELMAN'S Case.

S. C. 1 Will. 159.

MOTION to rechange the venue into Middlesex, because Spelman the plaintiff was a barrister; allowed to be good cause, if proved by affidavit, but not otherwise (*e*).

Middlesex is the venue for a barrister.

(*e*) *Bacon v. Ramsey*, Sty. 460; *Thompson v. Scroggs*, 2 Show. 176; *Row v. Russet*, Id. 242; *Wingfield's Case*, 1 Mod. 64; *Seaman v. Ling*, Salk. 668; *Burrough v. Willis*, 2 Lord Raym. 1556, 2 Stra. 822. But if he sue as a common person, or en

auter droit, or jointly with his wife or other person, or be defendant, he has no such privilege. So serjeants at law; Fr. Reg. 420: so attorneys; *Pye v. Leigh*, post, 1065.

SHORTER v. PACKHURST.

Attorney's privilege.

IF the plaintiff is attorney in B. R. and the defendant is so likewise, privilege will be allowed (*f*). *Secus* if plaintiff belongs to C. B. and defendant to B. R., for defendant is not supposed to be present in C. B. as he is in B. R. (*g*).

(*f*) *Ratcliffe*, one &c. v. *Besley*, 2 Str. 1141; *Barber*, one &c. v. *Palmer*, one &c. 6 T. R. 524; *Nichols*, one &c. v. *Earle*, one &c. 8 T. R. 395, acc.: and see *Crossley v. Shaw*, *post*, 1085.
(*g*) *Guy v. Rennell*, 2 Brownl. 266;

Hatherington, one &c. v. *Lewth*, 2 Str. 327, 1 Barnard. 182, 228; *Lauder*, one &c. v. *Cockayne*, Barnes, 44 (8vo. ed.); *Danser v. Berryman*, *post*, 1325, acc.: and see *Horn v. Howard*, *post*, 231.

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TRINITY TERM,—21 GEO. II. 1747.—K. B.

THE KING v. HARVEY.

S. C. 1 Wils. 164.

Near in a penal law construed strictly; yet not equivalent to *next*.

HARVEY was brought to the bar to receive award of execution, pursuant to stat. 19 Geo. II (*a*), for not surrendering upon proclamation being charged with smuggling. The directions of the statute appeared to have been pursued; except as to fixing the order of council, and proclaiming it, in two market towns near the place where the fact was committed. It was done in one town within six miles, in another within thirty-three miles, and in a third within forty-two miles; but there were four or five market towns within eight or nine miles of it. Therefore *Wright*, *Denison*, and *Foster*, Js. (*absente Lee*, C. J.) held, that the directions of the act were not strictly pursued, as is necessary in penal laws. Not that by *near* must be understood *next*; but there must be a reasonable vicinity, of which the Court will judge.

(*a*) C. 34, s. 2; amended and altered by 52 Geo. 3, c. 143, s. 11.

SYMONDS v. PARMITER (*b*).

S. C. 2 Stra. 1269.

Though outlawry be illegal and voidable, it cannot be set aside by a third person in a collateral action.

INDEBITATUS *assumpsit*. Process against two defendants on a joint contract. One of the defendants being sued to outlawry, the plaintiff claims his whole satisfaction of Parmiter the other defendant; who pleads in bar that the outlawry was illegal,

(*b*) The history of this case is as follows. The plaintiff sued out a writ against Parmiter or Parminter and his partner

Barrow, in Easter T. 1743, 16 Geo. 2; and proceeded to outlaw Barrow in Hil. T. 1744, 17 Geo. 2; and declared against

and therefore the plaintiff cannot come upon him only. Plaintiff demurs, &c.

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For the defendant it was argued, 1, That the outlawry was illegal, because the party was not commorant in the realm. *2, That defendant Parmiter may avail himself of this irregularity; because it is no new matter, but merely an answer to the plaintiff's declaration; 2 Mod. 308; 2 Roll. 804. It could be pleaded no other way than in bar; not in abatement, because we cannot give the plaintiff a better writ. For the writ was right being against both. No inconvenience will arise to plaintiff by this bar; because he might discontinue his action, and begin again regularly. There were cited 2 Vent. 104; 1 Lutw. 35; 1 Leon. 87. Stat. 6 Hen. 8, c. 4; Dyer 214 a; Carth. 459. Though Court won't presume error in outlawry, yet if pointed out to them they must take notice of it.

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For the plaintiff it was insisted; that supposing the outlawry to be erroneous, yet 'tis not void till made so by due course of law; and therefore defendant Parmiter cannot avail himself of it.

Per Cur. LEE, C. J.—This case is quite new. The plea seems disagreeable to the rules of law, and cannot be pleaded in bar. The plaintiff cannot discontinue without leave of the Court. The rule of law is, that such outlawries are not void, but voidable, 1 Lutw. 40, and voidable only *sub modo*, by putting in bail, by the party himself. Therefore, a stranger to the outlawry shall not demand of the Court, to pronounce the outlawry null.

WRIGHT, J. inclined to the same opinion, but desired time to consider of it.

DENISON, J.—If this plea prevails, no action against two partners would stand. Defendant shall not set aside a judgment of outlawry by plea. An outlawry cannot be reversed in a collateral action. I am quite clear.

Judgment for plaintiff, unless cause before the end of the Term (c).

Parmiter in the Trinity T. following (see 1 Wils. 78), shewing the outlawry in his declaration, to which Parmiter pleaded *non tiel record*; 1 Wils. 86, 97: and also that Barrow, "before and at the time of the obtaining of the original writ, on which the outlawry by the said declaration was supposed to be obtained and had against Barrow; and also before and at the time of the awarding of the writ of *exigent*, and continually from that time hitherto, did dwell and was commorant, and was then dwelling and commorant in parts beyond the seas, and out of the limits of this realm, to wit, at Bilboa, in the kingdom of Spain, in the said declaration mentioned; and that the county of Cornwall in this kingdom was and is the shire next to the place where the said Barrow, at the time of the said writ of *exigent* awarded, had his dwelling; and that not any writ of pro-

clamation thereon was awarded, made, or directed to the sheriff of the said county of Cornwall." To this plea the plaintiff demurred, and judgment was thereupon given for him as reported in the text and in 2 Strange, in Trin. T. 1747, 21 Geo. 2. A writ of inquiry was executed, and afterwards, in Hil. T. 1748, 21 Geo. 2, the defendant moved in arrest of judgment, as reported in 1 Wils. 185; the principal point then decided was, that the drawer of a bill of exchange has a right of action against the drawee after his acceptance. The defendant then brought a writ of error in Dom. Proc., where the judgment of B. R. was affirmed; 4 Bro. P. C. 604, or 2 Bro. P. C. 43 (3rd ed).

(c) This case is recognised in *Sheppard v. Baillie*, 6 T. R. 327: there two out of three joint-contractors were in Scotland, and had no property within the jurisdic-

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tion of the Court; and Lord Kenyon said, "Nothing can be more clearly established, than that in cases of contract the plaintiff must sue all the contracting parties, and proceed to outlaw such of them, as do not appear in answer to the writ." *S. P. Edwards v. Carter*, 1 Stra. 473; *Goldsmith v. Levy*, 4 Taunt. 299. The declaration

must allege, that the joint-contractor was in due manner outlawed in that suit; *Saunderson v. Hudson*, 3 East, 144; but it need not be alleged with a "*prout patet per recordum*." *Macmichael v. Johnson*, 7 East, 50. See *Knight v. Parker*, post, 759; *Abbot v. Smith*, post, 947.

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ALLEN v. HEBER.

S. C. 2 Stra. 1270.

A charge by will on an estate does not make the heir a purchaser.

ACTION of debt on the bond of the father, to whom the defendant is heir. Plea, *Riens per descent* (d). The fact was, that the father had devised his lands to the defendant charged with debts. *Qu.* If this makes him a purchaser? For plaintiff: held, Hob. 30, that it will not make the heir a purchaser. But if the tenure or quality of the estate were altered, it had been otherwise: *Dyer* 124; *Styl.* 148; *Hedger and Row*, 3 Lev. 127, a devise to heir *ex parte materna* of no effect (e). *Moor* 644; *Cro. Eliz.* 919; *Lutw.* 797, *Salk.* 241 (f). For defendant were cited *Cro. Car.* 161 (g); 2 Mod. 286, *Brittan* and *Charnock*.

Per tot. Cur'.—If the tenure or quality of the estate be altered, the heir is a purchaser; but a charge on the estate does not alter the manner of the heir's taking the land. A devise is void, where it gives the same as would be taken by descent; 1 Ld. Raym. 728 (h).

Judgment for the plaintiff.

(d) See Com. Dig. *Pleader*, (3 E. 3). Bac. Abr. *Heir & Anc.* (F) p. 462.

(e) As to the cases, in which a descent *ex parte matern* shall be considered broken, so as to let in the heir *ex parte patern*, see *Martin v. Strachan*, 1 Stra. 1179, 1 Wils. 66, Willes, 444, 5 T. R. 107, n. (a), 6 Bro. P. C. 319, (2nd ed.); *Roe v. Baldwre*, 5 T. R. 104; *Doe v. Morgan*, 7 T. R. 103; *Harg. Co. Lit.* 12 b, n. [63], and *Hurst v. Earl of Winchelsea*, post, 187; *Burgess v. Wheate*, post, 128. See also *Hutcheson v. Hammond*, 3 Bro. C. C. 128.

(f) *Clarke v. Smith*, S. C. 1 Com. R. 72.
(g) *Gilpin's Ca.* "It appears by Mr.

Ford's note of *Allam v. Heber*, though this is not noticed either in *Strange* or *Blackstone's* report of that case, that the Court denied *Gilpin's* case to be law: "per Bayley, J., 5 M. & S. 20.

(h) *Emerson v. Inchbird*. S. P. *Chaplin v. Leroux*, 5 M. & S. 14. See also *Langley v. Sneyd*, 3 Brod. & B. 243; *Smith v. Trigg*, 1 Stra. 487; *Scott v. Scott*, 1 Eden, 458, where the cases on this head are referred to in Mr. Eden's note; *Doe v. Timins*, 1 B. & A. 530; Com. Dig. *Descent*. (A). As to equitable assets, see *Bailey v. Ekins*, 7 Ves. Junr. 319; *Shiphard v. Lutwidge*, 8 Ves. Junr. 26, and *Smith v. Parker*, post, 1230.

THE KING v. The Bishop of CHESTER.

S. C. 1 Wils. 206.

Mandamus refused, to a visitor, to restore a canon whom he had expelled.

MOTION for a *mandamus* to the bishop, as visitor of the cathedral of Chester; to restore one Prescott a canon, whom he had removed for several enormities. It appeared by the statutes of the church, that the bishop had a general power pu-

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nire et reformare; that he had power once in three years to visit the chapter, to examine the dean and canons (on oath, if necessary) as to any enormities by them committed, and to correct such enormities; and that he had also a power to expel scandalous members, after they were thrice in vain admonished by the dean. In the present case it was suggested, that the bishop had expelled Prescott without any previous admonition by the dean; and upon that ground a *mandamus* was moved for; the bishop having, as was said, exceeded his jurisdiction.

* When it was first moved, it was argued by Mr. Ford and Mr. Evans: 1. That the bishop had no jurisdiction, the visitatorial power (*g*) not commencing in him, till the dean had thrice exerted his admonishing or coercive power; and the words *punire et reformare* must not be construed to imply expulsion, for that power can only be given by express words. 2. That if the bishop had a jurisdiction, yet he has not pursued the form of it; and that in these inferior jurisdictions, it is necessary, that they should keep strictly to the form chalked out to them. The form prescribed in the triennial visitations ought to have been observed in this visitation; *i. e.* to call the dean and canons before him, and to interrogate them upon oath. This has not been done. Besides, this being a particular jurisdiction (if any) it should have been stated on the face of the sentence. 3. If either there is no jurisdiction, or the form of it is not pursued; this Court will interpose, as the general guardian of the rights of all men, and as the only remedy which the nature of the case admits of. This was allowed in the famous case of *Philips and Bury* (*h*).

Per Cur'.—This would have been a proper subject for a prohibition, if the bishop assumed a jurisdiction which he had not. However, let the bishop shew cause.

Postea, M. 21 G. 2, cause was shewn by Sir Richard Lloyd, Mr. Gundry, and Mr. Henley; who argued,—That the Court cannot issue a *mandamus*, except they are legal judges of the duty required to be done; and that they are not legal judges of the visitor's duty.—That private and domestic institutions are subject only to private and domestic jurisdiction; and this Court only inspects such jurisdictions as are of a public nature. Y. Bk. 8 Ed. 3. Lib. Ass. pl. 29; *Philips and Bury*, 1 Sid. 71; Rastal, 1; Comb. 143, *Parkinson's Case*; 2 Show. 170, *Appleford's Case* (*i*); Stillingfl. Disc. 269.—* That the three previous admonitions of the dean are requisite when the Society call in the visitor; but not, if he visits them voluntarily, as every visitor has a right to do.—That this Court cannot judge of the limitations and bounds, which are said to be set to the bishop's jurisdiction. The statutes direct, that if a question arises, whether the bishop rightly interprets the statutes, it shall be determined by the Archbishop of York; and Prescott should have applied to him.—That no case can be cited, where a man-

(g) See Lord Mansfield's judgment, *post*, 81, 90, n. (h).

(h) 1 Lord Raym. 5, 2 T. R. 346, Skin. 475, Show. P. C. 35.

(i) Mod. 82, 2 Keb. 799, 861; S. C. cited in 2 T. R. 355.

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damus has been granted to a visitor (*k*).—That if there could, yet it would be too late to apply for a *mandamus* after sentence given. A prohibition should have been moved for, pending the suit: That this Court cannot compel a visitor to shew cause for a deprivation; and, if he does shew any cause, that cause is not traversable: 7 Rep. 41, *Kenn's Case*; *K. and Walker*, Hil. 9 Geo. 2. (*l*).—That in *Sherlock's Case* (*m*), a *mandamus* had indeed been granted; but then the prebend which he demanded was annexed to his headship by act of Parliament. Not that an act of Parliament, merely to confirm private statutes, will warrant a *mandamus*. *K. and Bugg*, M. 9 Geo. 2.—That if the *mandamus* should now be granted; the Court will assert a power of interpreting all statutes of all corporations, which it has never hitherto done. 3 Mod. 265.

[*25] In support of the rule, Sir *Thomas Bootle*, Mr. *Hume Campbell*, Mr. *Ford*, and Mr. *Evans*, argued,—That if the Court would not inspect the tyrannical exercise of visitatorial power, it would be of very bad consequence.—That by such a doctrine, collegiate bodies would be put out of the King's protection, and the benefit of the law, which they ought not to be: *Lee's Case*, Skynn. 290 (*n*).—*That in this case the bishop is to fill up, if he removes; and is therefore judge in his own cause; which is contrary to reason, equity, and law; and none of the cases cited on the other side are of this kind.—That according to the canon law, admonition was always a necessary antecedent to expulsion: Lyndw. 10, 93. That for want of three previous admonitions, the bishop had no jurisdiction. This was a judgment obtained *per saltum*, which ought to have been *per gradus*; and such judgments are void.—That the Court have sometimes looked into the justice of a sentence in a regular jurisdiction: Hob. 63, *Martin and Marshall*; Hob. 246, *Smith and Pannel*.—That if the Court will not enter into the justice of a regular visitor's sentence, yet if he has no jurisdiction they will interpose. And, if there be originally no jurisdiction, a sentence given will not assist it.—That *mandamus's* have been granted to restore some sort of spiritual or ecclesiastical officers; as schoolmasters, registers, &c. 1 Sid. 40; 2 Sid. 112; Comb. 144; Carth. 170.—That the appeal to the Archbishop of York lies only in disputes between the dean and canons concerning the meaning of the bishop's injunctions; which is not the present case.

LEE, C. J.—The difficulty with me is the manner of application; for a *mandamus* after sentence: had a prohibition been moved for in time, it might have been granted. The cases cited for the bishop are not quite apposite; I think the matter deserves to be tried, but how to do it is the question. To be called *coram non judice* is a gravamen that will warrant an application to this Court, though there have been no farther proceedings. Certainly, if a visitor is in his jurisdiction, his acts

If a visitor acts within his jurisdiction, his acts are uncontrollable; if out of it, his acts are void.

(*k*) See *post*, 90, n. (*k*).

(*l*) Ca. temp. Hardw. 212, 1 Burn's Ecc. L. 455 (ed. 1809).

(*m*) Cited 1 Wils. 208.

(*n*) S. C. 3 Lev. 309.

are not to be inquired into; if out of it, his acts are void. I shall look into *Brideoak's Case*, Hil. 12 Ann. and then deliver my opinion.

*WRIGHT, J.—In *Brideoak's Case* a *mandamus* was refused; but by consent the right was tried by prohibition. *Adjournatur*.

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Postea, Hil. 21 Geo. 2, The Court gave their opinion, and *per* LEE, C. J.—It would be very extraordinary if the bishop should be excluded from his right of visitation, by the negligence of the dean. There is no precedent, where a *mandamus* has gone to a visitor, to reverse his own sentence. It was refused in *Brideoak's Case*.

Visitor may visit whenever he pleases.

No *mandamus* to a visitor to reverse his own sentence.

WRIGHT, J., of the same opinion. Visitors have an absolute power; the only absolute one I know of in England.

DENISON, J.—The bishop has an original jurisdiction whenever he thinks proper to visit; but he cannot be *called in* till after admonition. This is like the cases of *Philips* and *Bury*, and *K.* and *Appleford*. This Court cannot control visitors.

FOSTER, J., concurred (o).

Rule discharged, *per tot Cur'*.

(o) The Court will not grant a *mandamus*, where there is a specific remedy at law, but the party applying must make out a *legal* right; if he only make out an *equitable* right, the Court cannot interfere; *R. v. Bishop of Chester*, 1 T. R. 396; *R. v. Marquis of Stafford*, 3 T. R. 646. So with regard to the admission to a perpetual curacy, Lord Mansfield said: "If a *quare impedit* does lie, a *mandamus* does not: no case is proper for a *mandamus*, but where there is no other specific remedy;" *Powell v. Milbank*, 1 T. R. 401, *in not*. It is necessary for a party applying for a *mandamus* to be restored to any office

to make out a *prima facie* title to such office. There is a great deal of difference between a *mandamus* to admit and a *mandamus* to restore: the Court has always looked much more strictly to the right of the person applying for the latter: he must shew a *prima facie* title; *R. v. Jotham*, 3 T. R. 577. See also *Bentley's Ca.*, 1 Stra. 557, 2 Lord Raym. 1334, 8 Mod. 148, Fort. 202, 1 Burn's Ecc. Law, 446 (ed. 1809); *R. v. Warren*, 1 Cowp. 370; *R. v. Mayor of London*, 2 T. R. 177; *R. v. Cambridge University*, 6 T. R. 89; Bac. Abr. *Mandamus* (C); Com. Dig. *Id.* (A).

MICH. TERM,—21 GEO. II. 1747.—K. B.

[27]

DR. YOUNG v. DR. LYNCH.

S. C. Say. R. 84, but not S. P.

ACTION brought by a prebendary of Canterbury against the Dean, for part of the profits of his prebend. Motion for the plaintiff to have a rule (a) for access to the charters, statutes, injunctions, and acts of Chapter.

It was argued for the defendant, that as to the charters and statutes (which were given by King Hen. 8, and Car. 1.) there is a public repository, where they may be seen. So as to the injunctions of archbishops, there is also a repository. As to the acts of Chapter, it is not proper to look at them at all times;

Prebendary may inspect charters, &c. of the Chapter in a suit concerning his prebend, at seasonable times.

(a) As to the time of granting the rule, see *Hodges v. Atkis*, *post*, 877.

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especially at *audit time*, which would be very inconvenient to the public business of the Chapter.

The rule was granted, but understood to be at all times seasonable (*b*).

(*b*) In an action brought by a corporation against a stranger, the Court refused the defendant a rule to inspect the corporation muniments; and Lord Kenyon said, "Where the dispute is between different corporators, there an inspection may be granted; but I cannot conceive, why an inspection of the muniments of a corporation should be granted, when a similar inspection would be denied between private persons only. I cannot make a distinction between a corporation aggregate and a corporation sole, or between a corporation

sole and a private person suing in his individual capacity;" Mayor of *Southampton v. Graves*, 8 T. R. 590; *R. v. Bridgeman*, 2 Stra. 1203; *Crewe, q. t. v. Saunders*, Id. 1005; Mayor of *Exeter v. Coleman*, Barnes, 238 (8vo. ed.) acc. A contrary practice had once crept in; Mayor of *Lynn v. Denton*, 1 T. R. 689; Corporation of *Barnstable v. Lathey*, 3 T. R. 303. See also *Ex parte Davison*, cited 1 Cowp. 319, and *R. v. Dr. Purnell*, post, 37; Com. Dig. *Evidence* (C. 2.), pa. 92.

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EASTER TERM,—21 GEO. II. 1748.—K. B.

WILLIAMS v. VAUGHAN.

Prohibition for trying the right of naming a churchwarden in Court Christian.

MOTION for a prohibition. Vaughan claims to appoint a churchwarden by custom, and institutes a suit in Court Christian against Williams, who was chosen by the parish. Williams moves for a prohibition. Mr. Pratt shewed for cause, that the nature of the office is entirely spiritual; Raym. 246; *K. v. Rees*, Carthew, 393. But *per* LEE, C. J., churchwardens are considered as temporal officers in several acts of Parliament (*a*).

Rule for a prohibition made absolute.

(*a*) *Dawson v. Fowle*, Hardr. 378; Godb. 163, 279; 1 Burn's Ecc. Law, 401 (ed. 1809); *R. v. Shepherd*, 4 T. R. 381;

1 Bac. Abr. *Churchwardens* (A); 4 Vin. Abr. *Ch. Ward.* (B), p. 527. And see *R. v. Dr. Harris*, post, 430.

[29]

TRINITY TERM,—22 GEO. II. 1748.—K. B.

LLOYD v. WOODFALL.

S. C. 1 Wils. 216.

Serjeant is privileged from arrests as well as private men.

WOODFALL was a serjeant in the Guards, and arrested at the suit of Lloyd, for a less debt than is allowed by the annual Mutiny Act to warrant the arrest of a soldier (*a*). Being re-

(*a*) By the Mutiny Act, 53 G. 3, c. 17, s. 114, (same clause continued in the annual Mutiny Acts), it is enacted, that "No person listing or entering himself as a volunteer in his Majesty's service as a soldier shall be liable to process, except for some criminal matter or for an original

debt of 20*l.* at least, over and above all costs." It seems, that if the original debt be under 20*l.*, but with the costs it amount to more than that sum, and then debt be brought on the judgment, a soldier is entitled to the benefit of the act: see *Flanders v. Nicholls*, Barnes, 433 (8vo. ed.).

moved hither by *habeas corpus*; it was insisted by *Ryder*, Attorney-General, Sir *John Strange*, and *Murray*, Solicitor-General, that he was equally privileged as a common soldier, and therefore they moved for his discharge.

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The Secretary at War sent a certificate to the Court, of the nature of a serjeant's station; which, though opposed, was allowed to be read as evidence^(b).

Certificate of
the Secretary at
War, read as
evidence.

It was argued for the motion, that serjeants are enlisted as common soldiers, quartered as such, under the same discipline, and equally entitled to Chelsea hospital. They may be degraded to private men by the commanding officer, which a commission officer cannot; he therefore remains a common soldier, though in a more exalted degree. If a common soldier is made an officer, he is discharged thereby from his tie of enlisting; and if broke afterwards, he cannot be retained as a private man. Drummers are considered as common soldiers; and in the case of *Johnson* and *Lowth*^(c), 3 Geo. 1, a gunner was discharged by this Court as a common soldier, though he has a warrant, and one shilling *per diem*. The end of granting this privilege was to encourage enlisting, and to prevent the service from suffer*ing by having men taken out of it for small debts. [* 30] This end more frustrated by the arrest of serjeants, than of private soldiers.

Mr. *Ford*, *contra*, argued that this Act was in derogation of common right, and must therefore be taken strictly. Defendant is an officer, though a non-commissioned one. Whenever the Act intends a distinction, it distinguishes the commissioned from the non-commissioned officers. Though serjeants are in some respects put on the same footing as common soldiers, yet this does not prove them so in all other respects. If a common soldier resists a serjeant, he is punishable for mutiny; and mutiny is defined to be rebellion against an officer. Serjeants are officers in respect to billeting of quarters. Serjeants have a command, which drummers and gunners have not. The question is, not whether he may be reduced to a common soldier, but whether he is one at present; and the power of reducing him hereafter shews he is not one now. This precedent will extend to all agents, quarter-masters, &c. who are all on the same footing as serjeants, being all of them equally warrant officers.

LEE, C. J.—This clause of the Act is intended for the encouragement of volunteer soldiers. The single question is, whether a serjeant is to be considered as a listed volunteer soldier. It is said they are properly officers: but they are considered in most respects as listed soldiers. I think they still remain listed soldiers; though they have a particular duty

(b) A copy of the Articles of War, purporting to be printed by the King's printer, is sufficient evidence of them; but the Court will not take judicial notice of them without; *Withers' Case*, 1 East, P. C. 233; cited in *R. v. Holt*, 5 T. R. 446.

(c) 1 Stra. 7, 10 Mod. 346, S. C. See also *Bayley v. Jenners*, 1 Str. 2; *Methuen v. Martin*, Say. 107; *Rickman v. Studwick*, 8 East, 105. But an out-pensioner at Chelsea is not within the Act; *Bowler v. Owen*, Barnes, 432.

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assigned them, and that therefore they are within this clause of the statute.

DENISON, J.—A serjeant is a soldier with a halbert, and a drummer is a soldier with a drum.

The defendant was discharged *per totam Curiam*.

RAMSAY v. M'DONALD.

S. C. 1 Wils. 217; Fost. Cr. L. 61.

An attainted person charged in a civil suit by leave of Chief Justice not to be discharged on motion.

[*31]

THE defendant was a native of Great Britain, but a banker at Paris, and indebted to the plaintiff in a bond of 1000*l*. He came to England, and was attainted of high treason; and being in prison, was by leave of the Chief Justice charged with a civil action on the part of the plaintiff.

* *Ryder*, Attorney-General, moved to discharge him from this action, as being amenable only to the Crown in his present state.

Henley, contra.—The King hath no absolute property in the body of a person attainted: His property is limited, and if he waives it, the body is liable to all other claims. An attainit is not *civiliter mortuus*. If he be slain, his wife may have an appeal. He is capable of purchasing (*d*). If he commits any outrage, an action lies against him when pardoned. 3 Inst. 215; The body of an attainit may be taken in execution; nor can he make use of his attainder, even as a dilatory plea. No inconvenience will accrue to the prerogative, if attainits are allowed to be liable to civil actions; for the Crown may still execute the law. Nor will it limit the King's mercy, for he may still pardon either absolutely or conditionally, though not upon such condition as will be detrimental to the subject, such as going out of the kingdom. In *Banyster and Trussel*, Cro. Eliz. 516, adjudged that a person attainted could not plead his attainder, but was liable to be sued. *Walmsley, J.*, indeed differed, but on such authorities, as rather made against him, *viz.* Staundf. 107. An attainit may indeed demand judgment, whether he shall be put to answer another felony; because such second trial can avail nothing to either the King or the subject. *Secus*, if it will avail any thing; for one attainit of felony, may be again attainted of treason, in order to vest the forfeiture in the King, provided the treason was prior. And if diver persons are robbed, the felon shall be convicted on each prosecution, for the benefit of the subject, in order to have restitution. *Stanley's Case*, 1 Sid. 159, 1 Keb. 649, 723; One attainted of murder: he comes into Court and pleads a pardon: it was agreed, he was chargeable with whatever was in the marshal's book; but not to be charged in Court, nor *eundo vel redeundo*, because under the protection of the Court. *Hasting's Case*, Noy, 1; Action of debt: defendant pleads an attainder, judgment *quod respondeat*; though the King if he pleases may execute him. An outlaw or attainit shall answer but not be answered. *Hall*

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and *Trussel*, Moor 753, same point. *Foxworthy's Case*, Salk. 500, cited by *Attorney-General*, was thus: He was pardoned on condition to go beyond sea: motion to charge him * as in *custodia marescalli*. *Holt* denied it, because it might tend to defeat the condition of the pardon, and the pardon shall not put the creditors in a better case than before (c). But here was an actual pardon: In the present case it is only suggested to be probable. Besides he was not then in *custodia marescalli*, being pardoned. It was impossible to charge him as such. He was entitled to privilege in going and coming, and during his attendance. *Holt's* reasons in that case (as reported) were unnecessary, nay, unworthy of himself. They prove too much. They will equally hold in a general pardon as in a conditional. But on a general pardon, the power of charging him is undoubted. If the chance of defeating a supposed conditional pardon be a reason for discharging the present defendant, the Court must declare that he is not liable to arrests, which they will not do. 'Tis strange, that it should be necessary to have the leave of the Court to charge attaints. It seems to have arisen in Charles the Second's time; 1 Lev. 124, 146. Though it is become the practice to ask leave, yet the subject has as much right to have it, as to plead double. It has formerly, *Dyer*, 245 b, been a practice to get oneself indicted and convicted of a clergyable offence, and then to plead the attainder to defraud the creditors. *Trussel's Case* arose from the same method. If he cannot be charged, the action is suspended; and a personal action once suspended is gone for ever: *Finch L.* 100 b; 1 Inst. 280. The Crown can never intend to pardon him (supposing it lawful) on such condition as must be attended with manifest wrong to the subject. And upon the whole, it is submitted that this is a cause of too much importance to determine by way of motion.

Ford, on same side, argued; that being charged he is now a prisoner to the plaintiff, as well as the Crown; and it would be unjust to take away the right of action once allowed. *Foxworthy's Case* shews, that if a man is once charged, the Court cannot discharge him. So held in 1 Sid. 90, *Raym.* 58.

The *Attorney-General*, in support of the rule, stated that the question was, Whether the Court will give leave to charge him. For though leave has been given by the Chief Justice, *ex parte*; yet the Court will inquire, whether such leave ought to have * been given. Asking leave of the Court to charge [*33] shews, that without it there is no right. This practice is certainly as ancient as *Dyer's* time, as appears by the case cited from him. The Court is to see whether such charging will prejudice the Crown or no, and is not bound to grant leave. Nor is this such a case, as will induce the Court to exercise their discretionary power of granting leave. *Foxworthy* was in *custod. mar.* till he had paid fees. If, on pardons granted

(c) As to the effect of attainder and conditional pardons, see *Bullock v. Dodds*, 2 B. & A. 258. See also *R. v. St. Mary*

Cardigan, 6 T. R. 116; *R. v. Haddenham*, 15 East, 463; 6 Geo. 4, c. 25.

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on condition of exile, the prisoner may be detained on a civil suit; the consequence is, that he must be hanged if he can't pay the debt (f). This is a matter of state, and the King is the proper judge, whether it be for the benefit of the public, to grant an absolute or conditional pardon. The Crown has the absolute disposal of the defendant's person; and the plaintiff could have had no remedy against him, except by the pardon. *Copping and Gunner*, 2 *Ld. Raym.* 1572 (g). Defendant was convicted on the Black Act, and suffered to be charged; but the reason given is, because it did not affect the Crown. The cases cited relate only to the matter of pleadings, and only shew that the defendant shall not be allowed himself to take advantage of his own wrong. *Cro. Eliz.* 213; *Adjudged*, that an attainted person shall not be put to answer in B. R. where the Crown is interested, but in C. B. it is otherwise.

LEE, C. J. and *Cur.*—A person attainted certainly is bound to answer. But the question here is, whether the order for charging the defendant was at the time of making it regular. It then only appeared that M'Donald was attainted. Not so in *Foxworthy's* case, for *there* was a pardon. The case in Lord Raymond is mistaken. There was then an actual pardon, not barely a hint of one. Let the rule to shew cause be discharged, as the defendant was charged by leave of the Chief Justice. But you may move afresh to discharge the Chief Justice's order, which will bring the merits to be more properly considered.

No farther motion was made (h).

(f) The bail of a person pardoned on condition of transportation, may bring him up by *habeas corpus* in K. B., to surrender him in their discharge; *Vergen's Ca.*, 2 *Stra.* 1217; *Fowler v. Dunn*, 4 *Burr.* 2034; *Sharp v. Sheriff*, 7 *T. R.* 226. See also *Taylor's Ca.*, 3 *East*, 232; in *Lawrence v. Laidler*, 9 *East*, 155, n. (c). But not in C. P.; *Walsh v. Davies*, 2 *N. R.* 245, for the *habeas corpus* must issue from the Crown side.

(g) 2 *Stra.* 873, 1 *Barnard. B. R.* 339, 341, 356, *S. C.*

(h) But the Court of C. P. will not bring a prisoner up by *habeas corpus* in order to charge him; *Walsh v. Davies*, 2 *N. R.* 245. Neither will the Court of K. B. bring a prisoner up from the house of correction, that prison being under the direction of the justices and not of the sheriff; *Brandon v. Davis*, 9 *East*, 154.

[34]

THE KING v. The Mayor of HEYDON and Others.

S. C. 1 *Wils.* 244.

Court will not set aside upon motion, a plea of false additions in an information in the nature of *quo warranto*.

MOTION to set aside pleas in abatement, to an information in nature of *quo warranto*, against the Mayor and two Aldermen of Heydon. The Mayor pleads he is not an esquire (as stiled in the information) but a gentleman; the Aldermen that they are not gentlemen; but one of them a barber, the other a grocer. It was objected, that these are sham pleas; for there was no occasion for any addition, so that, if mistaken, it is only surplusage.

Sir John Strange shewed cause, that additions are necessary on indictments, in order to sue one to outlawry, 2 *Inst.* 670;

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and equally necessary on informations which is for matters indictable. No difference between an information for usurpation, and for a misdemeanour. Usurpations at common law punished by fine and imprisonment: But by statute these informations are allowed; and less strictness is not necessary on the statute, than at common law. *K. and Bennet (i)*, a *Shaftesbury* Case, Geo. 1, information in nature of *quo warranto* and acquittal. Motion for a new trial. Opposed, because it was a criminal prosecution. Said on the other side it was a civil suit. Referred to the twelve Judges, who were equally divided, two of each Court (*k*). This a criminal suit, because a Crown-office suit. In *Ward of Hackney's Case (l)*, process of outlawry went against him. The Court considers the usurpation as a crime, else they would not fine the defendant. *K. and Jones (m)* of the borough of Grampound, H. 15 Geo. 2, information in nature of *quo warranto*: Plea, not a proper addition: Set aside, because no affidavit annexed to the plea, not because a bad plea. *K. and Wightwick*, Mayor of Romney, 1734, same plea as the present; the Court refused to set it aside upon motion.

Sir *Thomas Bootle*, in support of the rule, argued, that at common law no addition is necessary; first required by stat. Hen. 5: and it may be questioned, if these prosecutions fall under this statute. Consider what the judgment here is, *vis.* to seize the office. No outlawry can be consequent upon it. *True, there may be a *capias pro fine*; but, 2 Inst. 665, in an assise of novel disseisin, and *capias pro fine* thereon, it is said, that it does not come within the stat. Hen. 5, of additions (*n*). This is not a personal action, nor an appeal. Process of exigent does not lie here. No case cited to shew it. Bro. Addition 2, 2 Inst. 665; In return of rescous, though process of outlawry lies; yet the statute extends not to it, because the statute relates only to the original writ. In the *K. and Wightwick*, the plaintiff had replied; and not moved as now, to set it aside in the first instance as a sham plea. These pleas will bring in all the mischief that the statute 9 Ann. (*o*) was made to prevent. Their validity may be determined on motion, as well as on demurrer. The defendants have appeared generally, and by such appearance they have waved all advantage of this exception.

LEE, C. J.—I hate and detest all frivolous pleas; but I never will make too much haste, in determining matters which may

(i) 1 Stra. 101.

(k) In *R. v. Francis*, 2 T. R. 484, the Court said that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding; and that there were several instances since the case in *Strange*, in which a new trial had been granted. "This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or seize it for the Crown; but hath long been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful

possessor: the fine being nominal only;" 3 Bla. Comm. 263. "Being a kind of civil proceeding, there ought to be no great fine set on the party;" Bac. Abr. *Information* (A). By 9 Ann. c. 20, s. 7, the 4 Ann. c. 16, and all the statutes of *jeofails* are extended to *quo warranto* informations.

(l) 2 Ld. Raym. 1461.

(m) 2 Stra. 1161.

(n) But Lord Coke says "that a *capias pro fine* and *exigent* doe lie."

(o) 9 Ann. c. 20; and see 32 Geo. 3, c. 58.

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be of consequence to the subject. Perhaps the merits may as well come before the Court on motion as demurrer. But I shall desire to look into the practice of the Court, and particularly the *King* and *Wightwick*.

Postea, LEE, C. J., WRIGHT and FOSTER, Js., agreed that the plea could not be set aside on motion, and cited *Sandwich* and *Lascelles*, T. 8 Geo. 1, but *Denison*, J., inclined to overrule it. The whole Court expressed their abhorrence of this kind of plea; and *Wright* said they might consider such behaviour in the fine, if the merits should turn out against the defendant (*p*).

(*p*) From the report in 1 Wils. 244, it appears that the Court refused to set aside the plea on motion: that afterwards a demurrer was put in to the plea; and in giving judgment thereon, LEE, C. J., said, he was of opinion, that this case was not within the statute of additions; and judg-

ment was given by the whole Court that the defendant *respondet ouster*: and Lord *Dacre's* Ca., Crok. Eliz. 148, is there cited. And see *Gray v. Sidneff*, 3 B. & P. 395; *Deishams v. Head*, 7 East, 383, as to the want of an addition in a declaration; Com. Dig. *Abatement* (F. 22, 23, 24).

WILLET v. ATTERTON.

The Court will not set aside a judgment, so as to allow the defendant to plead the statute of limitations (*q*).

THE plaintiff had signed judgment in *assumpsit*, which was owing to a mistake made by the defendant's attorney's clerk. I moved to set it aside on payment of costs. See Salk. 402. It was suggested on the part of the plaintiff, that the defendant meant to plead the statute of limitations. The Court would not set aside the judgment, unless the defendant would undertake to plead the general issue.

(*q*) S. P. *Stafford v. Rowntree*, 1 Tidd's Pr. 585 (7th ed.). Nor to give the defendant advantage of a nicety in pleading; *Forbes v. Lord Middleton*, 2 Stra. 1242. But a plea of the statute of limitations is now considered a plea to the merits, and therefore in C. P. an interlocutory judgment was allowed to be set aside, without re-

straining the defendant from pleading it; *Maddock v. Holmes*, 1 Bos. & P. 228: see *Rucker v. Hannay*, 3 T. R. 124. So the defendant may plead bankruptcy; *Evans v. Gill*, 1 Bos. & P. 52; or infancy, *Delafield v. Tanner*, 5 Taunt. 856, 1 Marsh. 391. See Tidd's Pr. *ubi supra*.

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MICH. TERM,—22 GEO. II. 1748.—K. B.

BOWLES v. JOHNSON.

Subpoena without tender of expences will not bring a witness into contempt, though he comes to the assizes and refuses to be sworn.

MOTION for an attachment against one Yerburgh, for not giving evidence at the assizes; he was subpoenaed, but had no offer to have his expences borne; but came to the assizes, where money was tendered him for that purpose; but he refused to be sworn, because this was an action of assault against Johnson, for a joint trespass with Yerburgh, against whom another action was brought, in which Johnson was subpoenaed to be a witness against him.

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LEE, C. J.—This is a new case. Attachments are a new practice. I remember the first motion for them. It was then agreed, that the same restrictions should be used in attachments as in actions on the 8 Eliz. one of which is, that a tender of expences should be made at the service of the subpoena. In this case, Yerburch has not been subpoenaed regularly, so as to subject him to 8 Eliz. In order to subject him to an attachment, you must shew him guilty of a contempt of this Court. This man happened to be in Court, but was not brought there as a witness. Whether he was a material witness, or no, is not significant. I am of opinion, this is not a contempt.

WRIGHT, J.—In *Chapman and Pointon* (a), P. 14 Geo. 2, two guineas were tendered to an evidence on a subpoena. The Court thought it not sufficient, so would not grant an attachment, though the witness would not come. Attachments are not yet granted in C. B. A person not properly subpoenaed is to be looked upon only as a stander by; and it is no contempt of the Court of *Nisi Prius*, for a stander by to refuse to be examined; much less of this Court.

DENISON and FOSTER, Js., *accordant*.

The Rule discharged (b).

[*37]

(a) 2 Stra. 1150; 13 East, 16, n. (a); 9; *Hallett v. Mears*, 13 East, 15. See also the cases referred to in *R. v. Rudge*, S. C.

(b) *Fuller v. Prentiss*, 1 H. Bl. 49; *post*, 432.
Holme v. Smith, 1 Marsh. 410, 6 Taunt.

THE KING v. WHITMORE.—THE KING v. DAWES.

THESE were two young students of Oxford, convicted on the evidence of one Blacow, for speaking treasonable words in the street of Oxford on the 14th of February preceding, (on an information filed by the Attorney-General *ex officio*), for which crime they had been punished by the Vice Chancellor in an academical way. They were now sentenced to pay five nobles a-piece, to be imprisoned for two years, to find security for the good behaviour for seven years, themselves in 500*l.* each, and two sureties in 250*l.*, to be imprisoned till the fine was paid and security found; and to go round immediately to all the Courts in Westminster Hall, with a paper on their foreheads denoting their crime. Which punishment was strictly put in execution.

Judgment for treasonable words.

THE KING v. DR. PURNELL.

S. C. 1 Wils. 239.

THE defendant was Vice Chancellor of Oxford; and the Attorney-General had *ex officio* exhibited against him an information, for not taking the deposition of Blacow the evidence, and for neglect of his duty both as Vice Chancellor and justice of the peace, in not punishing Whitmore and Dawes, who had spoken treasonable words in the streets of Oxford. The de-

On an information against a magistrate of a corporation for a misdemeanor, the Court will not grant a rule

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to inspect the
books of the cor-
poration to fur-
nish evidence.

defendant appeared to the first information, upon which a *noli* **prosequi* was entered, and a second filed, to which also the defendant appeared and pleaded; and a trial at bar was appointed November 21, but it was countermanded, and a new day, *viz.* February 6th was afterwards appointed. And now, the last day of the Term, the *Attorney*, without any affidavit, moved for a rule directed to the proper officers of the University to permit their books, records and archives to be inspected, in order to furnish evidence against the Vice Chancellor. This was moved as a motion of course for a peremptory rule, on a suggestion that the King, being visitor of the University, had a right to inspect their books whenever he thought proper. Notice of motion was however given the night before at nine o'clock, and it was opposed by *Henley* and *Evans*. And the Court, being of opinion it was not a peremptory motion, only granted a Rule to shew cause.

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In the next Term, Mr. *Wilbraham*, standing counsel for the University, shewed cause. That the rule was made on no affidavit: that it was drawn in very general terms, (to inspect books, records, and archives)—Records, if any, may be seen elsewhere. Archives cannot be inspected but by a figure, **continens pro contenta*. But this is a case of too much concern, to stand upon form. The principal case is, whether on a prosecution of a public officer for a supposed misdemeanour, the Court ought to grant inspection of the public books of a corporation. The rule is on Dr. Purnell himself. *Nemo tenetur seipsum accusare*. The law will not tempt a man to make shipwreck of his conscience, in order to disculpate himself. In Chancery, a man may demur, if on the face of the bill it appears, that the matter to be discovered will affect the defendant in a criminal way. It will be said, the Court usually grants rules to inspect public books (a). True, but then it is usually when franchises are contested, and the like; when inspection of those books are the only evidence, and the corporation (b) are considered only as trustees, just as lords of manors (c) are, of the public evidences belonging to the manor. But in no case has the Court ever interposed in a criminal prosecution to grant such a rule, and force such inspection. Many indeed have been granted to inspect poor's rates (d); but those

(a) See *Young v. Lynch*, ante, 27; Com. Dig. Evidence (C. 2).

(b) Corporation books are open to the members of the corporation, as court rolls are to the tenants of the manor; *R. v. Fraternity of Hostmen*, 2 Stra. 1222, and see Mr. Nolan's note, *ibid.*; *Hodges v. Atkis*, 3 Wils. 398, and post, 877; *Anon.* 2 Ves. Sen. 620. By 32 Geo. 3, c. 58, s. 4, the officer having the custody of the corporation records is to permit any member thereof to inspect the book of admission of freemen, &c. on penalty of 100l. As to this statute, see *Davies v. Humphreys*, 3 M. & S. 223. But this right of inspection is confined to members of the corporate body.

The book of admission of freemen is open to inspection, during elections, by 3 Geo. 3, c. 15, s. 4; *Schuldharn v. Bunniss*, 1 Cowp. 192.

(c) Where the lord of a manor has refused the inspection of the court-rolls, &c. of the manor, the Courts will grant a rule for that purpose of course: but this privilege is confined to the tenants of the manor; *Roe v. Aylmer*, Barnes, 236 (8vo. ed.); *Hobson v. Parker*, *ld.* 237; *R. v. Shelley*, 3 T. R. 141; *R. v. Lucas*, 10 East, 235; *R. v. Tower*, 4 M. & S. 162; *Addington v. Clode*, post, 1030; *Folkard v. Hemet*, post, 1061.

(d) See *Allan v. Tapp*, post, 850.

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are public evidences which every body has a right to. Was there never any prosecution carried on with the same spirit as this? Why then are no examples produced? By the same reason every person indicted might be obliged to shew, whether he had any evidence against himself. In *Bradshaw qui tam v. Philips*, A. D. 1735, in an action for bribery, motion was, to inspect the books of a corporation, to prove the defendant a freeman. *Hardwicke*, C. J., denied the rule, because the plaintiff was a stranger. This case is much stronger. It is a precedent of the first impression. There seems to be a general want of evidence; but it is to be hoped, there is no other view than for evidence in this particular case. A hundred cases may be shewn where such rules have been granted in *quo warranto's*(e), &c. but none in criminal cases. [The Attorney mentioned *K. and Burkins*, 7 Geo. 1, which was an indictment at a borough sessions, removed into B. R. by *certiorari*. Court said, the defendant might have a rule on the clerk of the peace, to have a copy of the names on the back of the indictment."] This is by no means a case. The indictment is a public record; he might have had it without a rule(f).

*Mr. Henley on the same side.—This is a rule of the greatest importance to the most respectable body in the nation. It gives authority to the lowest agent of the Crown to rummage the MSS. of the University. One rule, in applications of this kind, is, that the person applying has an interest(g) in the books and papers, so that in justice he is at all times entitled to have recourse to them. Another, that the person in possession is a trustee for the person applying (as a lord of a manor, &c.), and then the trust must be the subject in dispute; the suit must be about land in the manor, and averred by affidavit so to be. So corporations are the trustees and repository of the common franchises, and there is no instance of such a rule against a corporation, but where the franchise has been disputed, as on *mandamus* or *quo warranto*. The present rule is on an information against a Vice Chancellor and justice of peace. The Crown commences a prosecution against an individual of the University, and therefore desires to inspect the records of the University. By parity of reason, on an indictment against a citizen of London, they might inspect the records of the city. But it is suggested, that the King is visitor, and

(e) See *R. v. Babb*, 3 T. R. 579.

(f) It does not appear whether the offence in *R. v. Burkins* was a misdemeanor or a felony: probably the former, in which case the defendant is entitled to a copy of the record as a matter of right. In felonies the defendant can only have a copy of the indictment by leave of the Court: See *Morrison v. Kelly*, post, 385, and cases there cited. Where an information was filed against an officer upon the report of a board of inquiry, the Court of K. B. were of opinion, that the defendant had no right to have an inspection of that report: and *Buller*, J., said, that the practice on com-

mon law indictments, and on informations on particular statutes, shews it to be clear, that this defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial; *R. v. Holland*, 4 T. R. 691: and see *Horne v. Bentinck*, 2 Brod. & B. 130.

(g) Admitted in *Atherfold v. Beard*, 2 T. R. 614-15; *Talbot v. Villebois*, cited by *Buller*, J., in 3 T. R. 142: *Bishop of Hereford v. Duke of Bridgewater*, Bunb. 269; *Attorney-General v. City of Coventry*, Id. 290; and see the judgment of *Mansfield*, C. J., in *Bateman v. Phillips*, 4 Taunt. 162.

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therefore entitled to a rule. I question the fact. The Court will require to be well satisfied of that. But, if so, 'tis a strong reason against granting the rule, for then the Crown may enforce its demands in a visitatorial way. Suppose the Crown has a general interest in the books of a corporation; that will not entitle them to an inspection, except the books are the subject of the dispute. *Crew qui tam* and *Blackburn*, H. 8 G. 2 (*h*), an action for interfering in elections of members of Parliament, being a clerk of the Post-office: The Court would not grant a rule to inspect the Post-office books (though public books), because the cause did not concern them. *Benson and Cole*, M. 22 G. 2; motion to inspect Custom-house books, to prove the plaintiff in an insurance cause had no interest: urged that they were public books: refused, because they were not the subject of dispute (*i*). These were civil actions; the present otherwise. The avowed design of this motion being to furnish evidence, some precedent will be necessary; especially as a very bad use may be made of such a rule, when the University is much out of favour with some people.

[*41]

* Mr. Ford, on the same side.—*The College of Physicians v. Dr. West* (*k*), H. 2 G. 1; action for practising *sans* licence; motion to inspect the public books of the college; denied, because the defendant is a stranger to the college. *Cox and Copping*, 5 Mod. 395 (*l*); dispute about the glebe: Court would not grant rule to inspect the churchwardens' books; because it was a private dispute. There is no reason to grant this inspection, because the Vice-Chancellor is a justice. Is it because he is Vice-Chancellor? Why? Not on account of his supposed visitatorial power; for in *Dr. Walker's Case* (*m*), the Court quashed a rule because they would not take upon themselves to act the part of visitors. The Court will not assist visitors, but only in support of their visitatorial authority. The visitatorial authority is not now in question; the Vice-Chancellor is prosecuted for a supposed offence at common law. If a witness has a question put to him that may affect himself, the Court will not oblige him to answer it (*n*). *Qu. and Mead*, 2 Lord Raym. 927; defendant was an attorney, and with others incorporated by act of Parliament as surveyors of highways, &c. Action against him, for not taking the oaths to qualify. Motion

(*h*) Reported as *Crews qui tam v. Saunders*, 2 Stra. 1005.

(*i*) See also *Abery v. Dickenson*, Say. R. 250.

(*k*) Gilb. Rep. B. R. 134.

(*l*) 1 Ld. Raym. 337. S. C.

(*m*) Ca. temp. Hard. 212.

(*n*) A witness is not compellable to answer a question, the answering of which may expose him to penalties, punishment, or a criminal charge; Sir J. Freind's Ca. 4 Harg. St. Tr. 605-6; Ld. Macclesfield's Case, 6 St. Tr. 649; R. v. Ld. G. Gordon, 2 Doug. 593; *Paxton v. Douglas*, 16 Ves. Jun. 239; *Cates v. Hardacre*, 3 Taunt. 424; *Maloney v. Bartley*, 3 Camp. 210; or that

may shew his own infamy, or tend to degrade his character; *Cooke's Ca.* 4 St. Tr. 748, 1 Salk. 153; R. v. *Lewis*, 4 Esp. 225; *Macbride v. Macbride*, Id. 242; *Dodd v. Norris*, 3 Camp. 519; R. v. *St. Mary's, Nottingham*, 13 East, 57, n. (*a*): but see R. v. *Edwards*, 4 T. R. 440, and also *Harris v. Tippet*, 2 Camp. 637; R. v. *Watson*, 2 Stark. R. 149—or that might subject him to a forfeiture of his estate; 1 Phillips' Ev. 278 (ed. 1822). But by 46 G. 3, c. 37, he cannot refuse to answer a question, the answering of which may tend to establish, that he owes a debt, or is subject to a civil suit.

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to inspect the corporation books; but denied, because they would not force a man to produce evidence against himself. *K. and Lee*, M. 17 G. 2; information against defendant as overseer, for making rate without churchwardens. Rule obtained by surprise, to inspect papers: not obeyed. Motion against *Lee* for an attachment. *LEE*, C. J., cited *Bradshaw* and *Philips*; Court refused to grant attachment, enlarged the rule, and it was dropped. The *K. and Burkins* only shews the tenderness which the Court always shews for persons under prosecution, and was to let him know his accusers. If the present defendant has evidence in his custody, and refuses to obey the rule, an attachment must issue; which would be as strange, as to grant one against a man, for not confessing his crime.

Mr. *Evans* on the same side.—* Had this been an information for exercising the office of Vice-Chancellor, motion might have been regular. In ecclesiastical jurisdictions, they used to compel a man to furnish evidence against himself: but by stat. Car. 2, oaths *ex officio* are taken away. On indictment for coining, the *Attorney* might as well move, to have a prisoner discover all his correspondence. 'Tis true, the crimes are less, and the punishment less; but the barrier of liberty is the same. If this rule be granted, the Court of K. B. would be no longer a court of justice, but an aid to an inquisition of state. This is an information *ex officio*, and all legal stops should be put to such informations. This Court sits to hear, not to furnish evidence. [*42]

Mr. *Morton*, on the same side would not repeat.

Ryder, Attorney-General, in support of the rule. This prosecution is out of favour to the University; to keep up a spirit of religion and loyalty there. Hard, that the University should interest themselves, to vindicate a member of their body that is under prosecution. If the prosecution be just, or unjust, it cannot hurt the University. Motion relates only to the public records, not to MSS. letters, &c. therefore cannot be so prejudicial as is represented. The intent is to see the statutes of the University, to which the motion shall be confined. The information is for not taking depositions against an enormous crime, as Vice-Chancellor and as justice of the peace: and these statutes direct the conduct of the Vice-Chancellor. The Court grants motions of course to inspect public books. It is as reasonable that public records should be produced for public justice, as private papers for private justice. It is not desired that the Vice-Chancellor but the public officer should produce them: should he prove to be the public officer, that is no reason against the motion; for it does not respect him as *defendant, [*43] but as public officer. The public is interested in the University statutes. We do not apply on behalf of the King as visitor, but as guardian of the public peace. In *K. and Burkins*, there was a rule of this kind made in a penal prosecution; a rule on a public officer, keeping a public record, for an inspection in a criminal prosecution. Informations in nature of *quo warranto*

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are public and criminal suits (o). There, rules of this sort are frequent. The case of *Bradshaw* and *Philips* was not of a public nature. *K.* and *Blackburn*; post-office books are not public, but the King's private books. *Benson* and *Cole*; same answer. As to the case of *College of Physicians*, that was the case of plaintiffs, and the Court will not compel the plaintiff to produce evidence against himself (p). In the *Qu.* and *Mead*, the books were of a private nature, and it appeared that the defendant was the person who kept the books. In the *K.* and *Lee*, it was plain, that the defendant was himself the person against whom the motion was made. Not so here; the Vice-Chancellor is not the person on whom the rule is to be made.

[Hereupon Mr. *Henley* suggested, that the Vice-Chancellor had the custody of the original statutes.]

Sir *John Strange* for the Crown.—Affidavits are not usual in such cases. In the case of the *Skinners' Company*, the Clerk refused to grant inspection, and an attachment was granted; but it was argued, whether the papers required were proper to be seen, and the Court held that they were. So here, if any thing improper be demanded, the inspection may be refused. Strange, that the University should conceal their statutes; since they are of so public a nature, that all the youth there entered, take oaths to observe them, and yet they are secreted from them. The Crown is the founder and lawgiver of the University, and as such has a right to inspect those laws.

[* 44] [LEE, C. J.—I apprehend this case is argued to differ from all others (as *Qui tam* actions, &c.) because in those * the party applying is a stranger; but that in the present case the King is no stranger, because he is the founder. But how does that appear? Another question; Is there any instance of an information against an officer of a corporation for breach of by-laws, and a rule granted to inspect those by-laws?]

Murray, Solicitor-General for the Crown.—Four necessary requisites for inspections of this kind. *First*, That they be public books. *Second*, That the party applying has an interest in them. *Third*, That they be material in a suit in this Court. *Fourth*, That the person in possession be forced to discover nothing to charge himself criminally.—*First*, These are of a public nature, given by the King, and open to all members of the University. The very youngest have a copy given them at their matriculation. *Second*, The King has an interest; he gave them, and has an interest in seeing them obeyed; and may enforce that obedience two ways; as visitor, and as King, where an offence at common law is mixed with the breach of them. *Third*, There is a suit in this Court, and the statutes may be material; and, if it is suggested that they will be so, the Court will grant the rule. *Fourth*, The objection is, that

(o) See, *ante*, p. 34, n. (k).

(p) Not even since 46 G. 3, c. 37, *supra*, n. (n). See *R. v. Woburn*, 10 East, 395. See also *Ord. dem. Dr. Lynch v. Stubbs*, Andr. 247, where the Court re-

fused a motion for the defendant, tenant of a Dean and Chapter, to inspect their books, because they were of a private right, and contained the plaintiff's evidence.

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in criminal suits no one is bound to furnish evidence against himself. Agreed, but a distinction may be made. When a man is a magistrate, and as such has books in his custody; his having the office shall not secrete those books, which another Vice-Chancellor must have produced. Besides, the statutes are not in the Vice-Chancellor's custody only, but also in the hands of the *Custos Archivorum*.

Sir R. Lloyd, on the same side.—The University is not accused; the University may therefore very safely produce their books. The King is as much related to the corporation of the University of *Oxford*, as to that of the city of *York*, and no more a stranger to one than the other. It is to be hoped, that the King is no stranger to either University. If a man were to be indicted for burning the records of a corporation; no doubt but such a rule would then be granted, *and why not now? *Per* LEE, C. J.—This is quite a new case. There is no precedent to warrant it, I therefore chuse to consider of it.

[* 45]

Afterwards, LEE C. J., delivered the opinion of the Court. This rule has been much narrowed, since it was first moved by Mr. *Attorney*. But still we are all of opinion, that we cannot, consistently with the rules of this Court, make such a rule. We ground ourselves on what has been done in similar cases, though none so strong as this. No case has been cited to support this application, but the *K.* and *Burkin*, which is not apposite. The clerk of the peace ought *ex officio* to have given a copy of the indictment, and the Court would have granted a rule on him to do it. The cases which we apprehend to be close to this are, 1st. *Qu.* and *Mead*, 2 Ann. Ld. Raym. 927. The reasons for denying the motion were, because, 1. The books were of a private nature. 2. Granting such rule would be to make a man produce evidence against himself, in a criminal prosecution. The second case is the *K.* and *Cornelius* and *Others*, Justices of Ipswich (q), T. 17 & 18 Geo. 2, an information for exacting money from persons for licensing ale-houses: A motion to inspect the corporation-books; cause was shewn against it by Sir *J. Strange* and Sir *R. Lloyd*. The Court on consideration were of opinion, that the rule could not be granted; as it was in a criminal proceeding, and it tended to make the defendants furnish evidence against themselves. These cases are very similar, only the present is rather stronger; because the information here is for a breach of and crime against the laws of the land, and this is an application to search books, which relate to the defendant's behaviour, as a member of a particular corporation. This case differs much from informations in nature of *Quo Warranto*; because these concern franchises, whereof the corporation books are the proper and only evidence, and they concern the Crown and the defendants equally. We know no instance, wherein this Court has granted a rule to inspect books in a criminal prosecution nakedly considered.

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The rule was discharged *per totam Curiam* (r).

"N. B. As the University statute book really contains nothing which could affect the merits of this case in any *degree; and as (if it had) printed copies of it are very numerous and easy to be met with; and the *Custos Archivorum*, in whose keeping the original is, might have been compelled to have attended with it at the trial: this extraordinary motion seemed only to have been intended, as an excuse for dropping a prosecution, which could not be maintained: and it was accordingly dropped immediately after, having cost the defendant to the amount of several hundred pounds."

(r) S. P. R. v. Worsenham, 1 Ld. Raym. Mansfield; May v. Gwynne, 4 B. & A. 705; Roe v. Harvey, 4 Burr. 2489, per Ld. 301; R. v. Heydon, post, 351.

TRINITY TERM,—23 GEO. II. 1749.—K. B.

DARELL v. BRIDGE, or The KING v. BRIDGE.

Information
Quo Warranto,
for holding a
court leet, after
long disuser,
without shewing
a title from the
original grant.

[* 47]

MOTION for an information in nature of *quo warranto* (a) against *Bridge*, for holding a court leet at Sittercamp in Cambridgeshire. In 14 Jac. 1, the Crown granted to Richard Miller and his heirs and assigns, the privilege of holding courts leet. No mesne conveyances appeared till 1702, when, and in 1708, 1719, and 1721 there were conveyances of the manor *with all courts thereunto belonging*, to those under whom the defendant claims. In the *deed of conveyance to him *A. D.* 1739, courts leet are expressly conveyed. In 1740 he held a court leet, the first within the memory of any one living, though courts baron had been frequently held. This was moved by Serjeants *Prime* and *Poole*, who argued, that the defendant could not deduce any title under the original grant; or, if he could, yet that non-user was a disclaimer and forfeiture of such a franchise. Sir *John Strange* and Mr. *Ford*, on the other side argued, that possession of the grant, together with the land, was an evidence of right, and that it would be of very pernicious consequence, to grant these informations, whenever a lord could not deduce a title by mesne conveyances. But *per Cur'*, As there appears no exercise of this grant till 1740, there is strong suspicion of some defect in title; and therefore it must go to be tried by a jury (b).

Rule for information made absolute.

(a) As to granting *Quo Warranto* informations, see *R. v. Marsden*, post, 579; *R. v. Dawes*, post, 634.

(b) A *Quo Warranto* lies for holding a court baron; *R. v. Stanton*, Cro. Jac. 259: So for exercising the office of steward of a court leet, *R. v. Hulston*, 1 Stra. 621; *R. v. Bingham*, 2 East 308: but not for holding a court leet in a manor within a hun-

dred; inasmuch as there a private right only is in question, and the lord of the hundred might bring an action against any person attending the manor court, for not attending the hundred court; *R. v. Cann*, Andr. 14, cited 3 Burr. 1822. The franchise of holding a court leet may be forfeited by neglecting to hold a court, when it ought to be holden; at least if such ne-

jects be often repeated and without a reasonable excuse; 3 Hawk. P. C. c. 11, s. 5: see also *Tottersall's Ca.*, W. Jon. 283; *R. v. Steward of Havering Atle Bower*, 5 B. & A. 691.

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THE KING v. The Inhabitants of WIGAN.

MOTION for an information against twenty-five persons for a riot.

A rising to quell a treasonable riot is lawful; and no information to be granted for petty irregularities in so doing.

It was sworn, that there was a hunting-match at Newton in Lancashire, at which many gentlemen were present. On the second day, one witness deposed, that some of these gentlemen proclaimed the Pretender and Prince Charles, and invited the people to list in their service. Of this the men of Wigan being informed, and that some of their friends were in custody, they rose in a body by beat of drum, in order to release their friends, and quelled the disturbances at Newton: That they went thither, and committed several unwarrantable acts upon the road, and broke open and rifled the house where they supposed their friends were confined, though they found none there.

LEE, C. J.—This Court will not grant the information. Here were gross disturbances at Newton: A levying, or a tendency to levy war. It is clear, that in such a case every subject is to be considered as an officer, though a private man. The greater the distance, the greater the merit. People rising in this manner, with a view to support the government, are *not to be blamed. It appears, they rose with this view. If some irregular acts may have been committed in such a case, there is no reason why this Court should interpose. Let them take the common remedy. WRIGHT, J.—Kelynge 76, Poph. 121 (c), it was resolved by all the Judges, 39 Eliz. that any subjects may arm themselves, to quell riots, rebellions, &c.; but the most prudent way is to apply to a magistrate. Every subject is bound by his allegiance, to do as these people have done. Little trifling circumstances are not to be regarded in such cases.

[*48]

LEE, C. J.—Hale, 2 H. P. C. 62, cites a sentence from Bracton, to confirm the case in Kelynge.

Rule discharged with costs, *per tot Cur' (d)*.

(c) 2 Bos. & Pul. 264, n (a). *S. C.* referred to in *Handcock v. Baker*, *ib.* which see, and 1 Hawk. P. C. c. 65, s. 11. (d) See *R. v. Spriggins*, *ante*, p. 2.

POITIER v. CROZA.

ACTION by the plaintiff, who was a dancer, against the defendant, who was master of the Opera House, for his salary. The defendant was retained by the Sardinian envoy, as his master of the horse. The motion on the part of the defendant was, to oblige the plaintiff to accept common bail. Sir Richard Lloyd shewed cause, and insisted, that the envoy not having had an audience of the King at the time of suing out

No privilege to servants of ambassadors unless *bond fide* menial and domestic.

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the writ, was not to be considered as one in a public character; and that the defendant was not a domestic servant, nor was retained at all at the time of suing out the writ. Sir *John Strange*, and Mr. *Hume Campbell*, in support of the rule, cited *Whitmore v. Alvarez* (a), M. 4 Geo. 2, to shew, that the defendant was within the statute, that case being of an English secretary, who did not lodge in the house; but it was ruled, that he was within the exception of the law. *Per Cur'. LEE*, C. J.—In *Martin and Gurdon*, temp. Lord *Hardwicke*, it was held, that swearing a person to be a domestic or menial servant, without specifying his employment, was not sufficient to discharge him. In the present affair, it is only sworn that he is master of the horse, and neither a domestic nor a menial servant. I remember a person swore, he was master of the horse and clerk of the kitchen to an ambassador; and it appeared the ambassador had no horse, and only part of a kitchen.

[*49] *WRIGHT, J.—In *Britwell and Carolina* (b), M. 17 Geo. 2, a person swore himself interpreter to an ambassador, and was not discharged.

FOSTER, J.—I remember a case where a person swore he was gardener to a public minister, who had no garden; and a clergyman who swore he was chaplain to the Morocco ambassador: Neither allowed.

Rule discharged (c).

(a) *Fitz.* 200; *Evans v. Hicks*, 2 *Str.* 797, 2 *Ld. Raym.* 1524.

(b) 1 *Wils.* 78, reported as *Malachi Carrollino's Case*.

(c) See 7 *Ann. c.* 12 (post, 471), passed for the protection of ambassadors, and their domestic servants. The defendant must be a *bond fide* servant at the time; *Seacomb v. Bowliney*, 1 *Wils.* 20; *Masters v. Masby*, 1 *Burr.* 401; *Fontainier v. Heyl*, 3 *Burr.* 1731; *Heathfield v. Chilton*, 4 *Burr.* 2015; *Delvaile v. Plomer*, 3 *Camp.* 47; a secretary, *Triguet v. Bath*, post, 471; *Hopkins v. De Roebeck*, 3 *T. R.* 79; but not a trader, or one subject to the bankrupt laws, by s. 5 of that statute. It extends as well to natives as to foreigners,

and to servants lying in the house as out of the house; but not to screen a person, who is not a *bond fide* servant; *Lockwood v. Dr. Coygarne*, 3 *Burr.* 1676; *Darling v. Atkins*, 3 *Wils.* 33. See *Com. Dig. Ambassador*, (B), and the judgment of Lord *Ellenborough* in *Fiveash v. Becker*, 3 *M. & S.* 284, in which case it was held, that a London merchant, acting as *consul* to a foreign prince is not privileged. So the chorister in the chapel of an ambassador, a British born subject residing in a house of his own, part of which he lets in lodgings, being also a performer at the Opera, is liable to a distress for poor-rates; *Novello v. Toogood*, 1 *B. & C.* 554, 2 *Dow. & Ry.* 833.

MICH. TERM,—23 GEO. II. 1749.—K. B.

KINCHIN v. KNIGHT.

S. C. 1 *Wils.* 253 (a).

One custom may be pleaded against another, where both are consistent.

TRESPASS for rooting up his soil by turning hogs upon his land. Defendant pleads a right of common for hogs by prescription. Plaintiff replies, by allowing the right; but quali-

(a) See also a true state of this case in 2 *Wils.* 101.

fies it by insisting, that by another custom the swine ought to be rung. To this the defendant demurs, and it was argued, that the replication was bad, because two contrary customs can't be pleaded, but the first custom must be traversed.

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* But *per Cur.*—One custom or prescription may be pleaded against another, where both may stand together. And these two customs may certainly stand together, being consistent with each other; the one being only a regulation of the other (a).

[* 50]

Judgment for the plaintiff.

(a) This case is recognised in *Brook v. Willett*, 2 H. Bla. 224, and *Parkin v. Radcliffe*, 1 Bos. & P. 282. See also *Bland v. Moseley*, cited 9 Rep. 58 a; *Spooner v. Day*, Cro. Car. 432; *Murgatroid v. Law*, Carth. 117; Bac. Abr. *Custom* (H); Bull. N. P. 59. Whenever any material fact is alleged in any pleading, which will, upon issue joined, decide the cause one way or other, if the adverse

party plead a matter inconsistent with, and contrary to such allegation, he must traverse it. But where a material point, alleged by one party, is fully confessed and avoided, that is, where the other party sets up a matter consistent with such allegation, but which, if true, is an answer to it, there he cannot also traverse it. Serjeant Williams's note to *Bennett v. Filkins*, 1 Wms. Saund. 22, n. (2).

WOODEN v. BOYNTUN.

PLAINTIFF had demanded a plea at eight o'clock at night, the rules for pleading being then out. Defendant put in a plea at seven the next night, but at six the plaintiff had signed judgment; which being within twenty-four hours, the Court set aside the judgment, on the authority of *Henley and Brand*, Trin. 23 Geo. 2, being the same point (b).

Irregularity by surprise.

(b) This was in *K. B. Dyche v. Burgoyne*, 1 T. R. 454; *Bowles v. Edwards*, 4 T. R. 118, *acc.* Defendant has twenty-four hours after demand, exclusive of Sunday; *Solomons v. Freeman*, 4 T. R. 557.

In C. P. the defendant has in all cases till the opening of the office in the afternoon of the following day to plead; *Cas. Fr. C. P.* 18, 54.

THE KING v. INGRAM.

MOTION for a *mandamus*, to deliver up books and papers, belonging to the borough of Droitwich. Mr. Bathurst shewed for cause, that Ingram was executor of Mr. Winnington, who had laid out several sums for the borough, and never been repaid; and that he kept these as a security for such repayment. But the Court said, that as he confessed having public books in his custody, a *mandamus* must go; and if he had any just cause for keeping them, he might set it out in the return. The *mandamus* granted (c).

Mandamus to deliver up corporation books.

(c) *R. v. Wildman*, 3 Stra. 879; *Borough of Calne*, Id. 948; *Sheriff of Not-*

tingham, 1 Sid. 31; *R. v. Clapham*, 1 Wils. 305.

HILARY TERM,—23 GEO. II. 1749.—K. B.

BREWSTER v. CAPPER.

S. C. 1 Wils. 261.

Misnomer pleaded after special imparlance.

DEFENDANT pleaded a misnomer in abatement after an imparlance (a); but it appeared on the record to be thus entered, "and A. B. who was arrested by the name of A. C. comes," &c. which the Court held tantamount to a special imparlance, on the authority of Keilw. 93 b (b).

Judgment for the defendant.

(a) It appears from 1 Wils. that the plaintiff demurred: he might have signed judgment; have applied to the Court by motion to set aside the plea; or have replied the imparlance by way of estoppel; Tidd's Prac. 475 (Ed. 1821).—See *Lloyd v. Williams*, 2 M. & S. 484.

(b) This case has been overruled in *Doughty v. Lascelles*, 4 T. R. 520: per *Curiam*, such a plea can only be received

after a special imparlance, which should be stated on the record. As to imparlances, see *Grant v. Lord Sondes*, post, 1094, *Mellor v. Walker*, 2 Wms. Saund. 1 e, n. (2). In K. B. a special imparlance is only granted by leave of the Court, obtained by a side-bar rule: in C. P. it is granted as a matter of course by the prothonotary within the first four days of the Term subsequent to that of the declaration.

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EASTER TERM,—23 GEO. II. 1750.—K. B.

THE KING v. The Bishop of ELY.

S. C. 1 Wils. 266.

Court will not grant a *mandamus* to a visitor, if his authority be dubious.

MOTION in Michaelmas Term last, for a *mandamus* to the Bishop as visitor of Trinity College, Cambridge, to proceed on an appeal brought by Dr. Vernon, against Dr. Walker the Vice-Master of the College, for removing him from his fellowship, in the absence of the Master; and also on a complaint brought by the said Dr. Vernon, of divers enormities committed in the said College. It was sworn that the Bishop refused to intermeddle, unless compelled thereto by law.

Dr. Vernon was one of the eight senior fellows of Trinity College, the statutes whereof direct all livings to be given, *seniori secundum gradus, sive præsens sit sive absens, qui non habet aliud sacerdotium sive ecclesiasticam promotionem; nisi prius deponere voluerit, aut nisi ex aliquo gravissimâ causâ per magistrum et socios approbandâ*. *Concionatores* are allowed to hold any living of 30*l.* per annum, but not two *cujuscunque summæ*; which by a subsequent explanation (which the statutes, cap. 42, allow the fellows to make) the College has declared, shall be understood of the valuation in the King's books. Dr. Vernon was rector of Bloomsbury, worth 150*l.* per annum, but not rated in the King's books; and the sinecure of Onwell in the gift of the College becoming vacant, he demanded the

presentation, and was presented (as he swears) unconditionally. The other fellows swear, he promised to resign at the end of his year of grace; at which time however the Vice-Master cut out his name, and he appealed to the Bishop as visitor; who declined acting, it being a litigated question ever since *Bentley's Case* (a), who was really the * visitor of the College, the King or the Bishop. The King, Hen. 8, was the founder; but in a body of statutes (of doubtful authority) by Ed. 6, it is ordered, *quod Episcopus Eliensis sit visitor*.

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Ryder, Attorney-General, shewed cause for the King. Sir *Richard Lloyd*, Mr. *Hume Campbell*, Mr. *Ford*, Mr. *Pont*, and Mr. *Eliab Harvey* for the College. [But nobody appearing for the Bishop, Mr. *Henley* insisted, that the rule must be absolute; which the Court would not hear of, but said the College had a right to interpose].

A College may interpose, to stop a *mandamus* to a visitor.

It was argued, 1. That there was no instance of a *mandamus* finally granted to a visitor. Colleges are private societies; the visitor's jurisdiction a private one. The Court never interposes, but where visitors exceed their jurisdiction, and then it will grant a prohibition. The Court cannot inquire into the legality of a visitor's sentence (b). Even if a visitor exceeds his jurisdiction, and advantage is not taken in time by prohibition; the Court will not grant a *mandamus*; *K. v. Bishop of Chester*, T. 21 Geo. 2(c). To reject and to determine an appeal is the same thing. Refusal to interpose is a determination in some sort against the appellant. The Court was formerly not so nice in granting writs of *mandamus*; but now they will not grant them, unless the person to whom they are directed, is shewn to be the proper officer: otherwise, will supersede them though granted upon argument; *K. and Sir Joshua Sharpe*, T. 13 Geo. 2(d); *K. and City of Norwich*, T. 23 Geo. 2(e). The ground on which *mandamus's* are usually granted, is the concern which the public is supposed to have in the question: In visitatorial questions, the public is not concerned. If visitor be unreasonable, *Holt* said in *Philips v. Bury* (f), fellows of colleges must take the yoke, as well as the charity. Yet there can be no failure of justice; for the Chancellor may issue out a commission here, as in case of other charities. The stat. 1 Geo. 1, concerning the abjuration oaths, orders visitors to admit others, into the room of nonjuring fellows: On their refusal, the Court may grant a *mandamus*.—Hence, it seems to have been thought, that the Court had no such power over visitors before. *2. The Bishop is not visitor. His power is given by a pretended charter of the Crown, 6 Ed. 6, signed indeed by the King and his Commissioners, but no Great Seal appendant thereto. And, except there be strong proof of the existence of the seal, the Court will not presume it, after so long

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(a) *Post*, 54, n. (h).

(b) *R. v. Bishop of Ely*, 5 T. R. 475, S. P.

(c) *Ante*, 22.

(d) *Gillb. Rep.* B. R. 255.

(e) *Quære*, if the case alluded to be not

R. v. Mayor of Norwich, 1 Stra. 55; and see *Poss v. Mayor of Leeds*, Id. 640; *R. v. Mayor of Abingdon*, 2 Salk. 699; *R. v. Mayor of Hereford*, Id. 701.

(f) 2 T. R. 358.

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acquiescence. There is no enrolment, no docket, of these statutes. Another body was granted by Queen Elizabeth, contrary to these in many respects, which takes no notice of them. In the annual commemoration of founders and benefactors, notice is taken of Edw. 6, for confirming his father's grants, but not for giving statutes. Queen Elizabeth is taken notice of as one, "who gave us the statutes by which we are now governed." The fellows and officers swear to observe Queen Elizabeth's statutes. Supposing them however genuine, they are not now in force, being superseded by Queen Elizabeth's: In which there is a particular visitatorial power given to the Bishop of Ely, over the master only, for particular crimes. Statutes given by the Crown may be varied by the Crown *ad libitum* (g). No proof, that the Bishop of Ely ever accepted the powers given him by King Edward's statutes; but if he did, a non-user of two hundred years will abrogate them. In Dr. *Bentley's Case* (h), articles were exhibited against him, before the Bishop of Ely. The House of Lords, on the appeal, were of opinion, that the Bishop had a power over him, by the statutes of Elizabeth. Accordingly, the Bishop deprived him; but the sentence could not be put in execution, but by the Vice-Master, who refused. Motion for a *mandamus* to the Vice-Master in B. R. and granted; but on the return was quashed (i). Then a motion for a *mandamus* to Bishop of Ely (k), to deprive the Vice-Master, as general visitor of the College. The Bishop did not think himself such. The present book of King Edward's statutes was then produced and canvassed, and the Court refused the *mandamus*. For whenever a doubt exists, whether there be a jurisdiction, the Court will not grant a *mandamus*. The right may be solemnly tried in the more usual forms of law; it has already been decided in this summary way. It seems, there are holes in the cover of the book, through which they suppose the strings or labels of the great seal went: Perhaps only a chain to hold it. One possibility to the contrary destroys that whole hypothesis. *The right of the Bishop is unnatural, and contrary to the general purview of the common law, which vests the right of visitation in the founder (l); the parent being most likely to take care of the

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(g) See *post*, 84.

(h) Articles having been exhibited before the Bishop of Ely against Dr. Bentley, Master of Trinity College, for misdemeanors in office, and dilapidation of the college revenues, he obtained a prohibition to the Bishop, and declared therein: the Bishop for a consultation avers, that he is general visitor: the Doctor replies, and the Bishop demurs to the replication, and judgment thereon, that the prohibition shall stand; *Bentley v. Episc' Eliens'*, 2 Stra. 912, Fitzg. 305, Fort. 298, 1 Barnard. B. R. 192, 388, 451, 2 Id. 9. A writ of error was brought thereon in D. P., when the judgment of B. R. was reversed, and the Lords granted a consultation as to some of the articles, and a prohibition as to

others; 2 Bro. P. C. 220 (2nd ed.), where all the proceedings are inserted at length. The Bishop proceeded in the appeal upon the articles allowed, and adjudged that the Doctor had incurred the penalty of deprivation of his office of master. For the subsequent history of this business see the *Biographia Britannica*, vol. ii. 238 (2nd ed). Consultation is a writ, whereby a cause formerly removed by prohibition out of the Ecclesiastical Court or Court Christian, to the King's Court, is returned thither again; Burn's Ecc. Law.

(i) *Dr. Walker's Ca.*, Ca. temp. Hardw. 212, 1 Burn's Ecc. Law, 455 (ed. 1809).

(k) Andr. 176.

(l) See *post*, 82 *et seq.*

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child. It is not law, to say that statutes once given to colleges cannot be altered. Even Henry the Eighth's statutes (if any) might have been revoked. But Edward the Sixth is on a footing very different. Any heir, either the next or the tenth, have the same powers; therefore one may rescind another's acts; Elizabeth might revoke Edward's statutes. One visitor may repeal another's injunctions. By consent of the College and visitor, these statutes might therefore be rescinded (m), and this consent must be presumed from so long acquiescence (n). It may be presumed, that even Edward himself cancelled them.

On the former motion, *Probyn, J.*, declared, if it were necessary to presume an act of Parliament, for annulling these statutes, he would presume it. All the Queen's counsel in Queen Anne's time (Sir *Joseph Jekyll* excepted) were of opinion, on her reference to them, that these statutes were invalid.

In support of the rule, *Mr. Henley, Mr. Evans, and Mr. Joddrel* argued,—1. That *mandamus* will go to a visitor. Visitors have a jurisdiction, are judges over a large body, and the public is therein concerned. Fellows of colleges are not deposed of the rights of justice; but the Court will control visitors, if they exceed their power, *a fortiori* if they will not exercise it (o). If a Court of Delegates refuses an appeal, the Court would grant a *mandamus*; or in any other case of a dernier resort of justice. In *Usher's Case*, 5 Mod. 452, it is not determined that a *mandamus* will not lie; but the rule was discharged on other reasons. Reason why no instance of a *mandamus* granted; because the clergy are not fond of refusing any jurisdiction. The Bishop of Ely received the appeal, does not now appear by his counsel, and has therefore no objection to the jurisdiction. To allow the Crown and the College to interpose, is obliquely giving them a prohibition before they are aggrieved; which is contrary to the general rule. Whenever the superior Courts * are ousted of their general jurisdiction by any special one, it is their duty to see that special jurisdiction exercised. This rule will not determine Dr. Vernon's right, but only compel the visitor to determine it. *Mandamus* to restore to a fellowship was granted so early as the reign of Edw. 2; 1 Lev. 23 (p). This Court must protect freeholds; a degree is a freehold, *Bentley's Case* (q); *a fortiori* a fellowship. Though this right is subject to ecclesiastical jurisdiction, yet the Court will compel an exercise of that jurisdiction. F. N. B. 248. There are many new cases wherein the Court grants *mandamus's*: therefore, though no precedent can be shewn, the Court may properly do it, if reasonable. 2. That the Bishop of Ely

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(m) *Quare tamen*; see post, 84.

(n) As to presumption arising from acquiescence, see *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. & A. 579: and as to presumptions generally, see *Stark. Ev. Part iv.* 1234.

(o) *R. v. Bp. Lincoln*, 3 T. R. 338, n. (a);

R. v. Bp. Ely, 5 T. R. 475, S. P.

(p) Cited in *Dr. Widdrington's Case*, in which, however, a *mandamus* was refused: S. C. 1 Sid. 71, 1 Keb. 234.

(q) 3 Ld. Raym. 1338, *arguendo*. *Quare tamen*.

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is the visitor of Trinity College. If there are traces of a seal on an old deed, it is tantamount to a seal(*r*). Apply this to the marks on Edward the Sixth's statutes. If these were never authentic, what condition was the College in, from the time of Henry the Eighth to Queen Elizabeth? A repeal shall not be presumed. In the *K.* against *Skinner's* Company, a recent case, where there were letters patent of K. Jac. 1, which the corporation had opposed with great vigour, and appealed to the council, who ordered a revocation; yet the Court would not presume a repeal, but ordered it to be tried. Queen Elizabeth in the preamble to her statutes recognizes these; *sanctissimis legibus ad pietatem et doctrinam commendavit*: can it be doubted, whether the College ever accepted statutes of such a character? In the commemoration, King Edward is said to have confirmed his father's grants. But how? By this book, no otherwise. The commemoration-day is appointed by this very book. The College act under it, and dispute it in the same breath. It may be objected, that the Bishop would not have accepted Queen Elizabeth's special appointment, if King Edward's general one had been valid. But the general power of visitation is only once in three years: Queen Elizabeth therefore removes a supposed difficulty, by allowing the Bishop to visit the Master as often as he pleases. [*Lee*, C. J., said, Visitors (however restrained by statutes) may visit as often as called in(*s*).] The visitatorial power, when once vested, was the right of the see of Ely, and the Crown could not repeal it. The case of Dr. *Bentley*, *11 Geo. 2, is not similar to the present(*t*). That was to grant a *mandamus* to one, to oblige another to do an act, which is contrary to the rule laid down in *Qu.* and Mayor of *Derby* in *Salkeld*(*v*). Suppose there was no seal to Edward's statutes. That will not be necessary in the appointment of visitors. If it be, the Court will presume it. The statute of frauds requires three witnesses to a will, who must sign in each other's presence; if there be three, the Court will not expect it to appear that they signed it in each other's presence, but will presume it(*u*). So the Court will presume a seal, if every other requisite be there(*w*). Elizabeth's statutes suppose the Bishop to continue visitor. On the Master's misbehaviour, it directs the appeal to be, not *episcopo Eliensi* simply, but *visitatori episcopo Eliensi*. If visitatorial power be suspended, it does not devolve to the founder or his heirs; but to the Court of K. B. In the case of *Manchester College*(*x*),

Visitors, though restrained to certain times, may visit whenever called in.

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(*r*) Where the seal to a deed is proved to have been torn off by accident, it will be evidence to be left to a jury, where the deed is only given in evidence to prove another issue; but where the issue is directly on the deed, on *non est factum*, a deed without a seal would not prove the issue, however the loss of the seal might be accounted for; Bull. N. P. 268. See *Seaton v. Henson*, 2 Show. 28, 2 Lev. 220; Lady *Argoll's* Case, Palm. 403; and also *Smith v. Woodward*, 14 East, 585.

(*s*) 2 T. R. 348, *acc. post*, 85.

(*t*) *R. v. Bp. of Ely*, Andr. 176.

(*v*) 2 Salk. 436.

(*u*) See, *ante*, 11, n. (*k*); *post*, 455.

(*w*) So, where an old indenture of apprenticeship was lost, the Court presumed that it had been regularly stamped; *R. v. Long Buckby*, 7 East, 45; see Stark. Ev. Part iv. 1250.

(*x*) By the name of *R. v. Episc. Chester*, 2 Stra. 797.

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the same person happening to be both warden and visitor, stat. 2 Geo. 2, was made to enable the Crown to visit during such suspension, which shews the sense of the Legislature. When a college is founded, the founder may make what laws, or appoint what visitor he pleases; but on a change of statutes, the society must accept them; else not valid. By the charter, power of making statutes was reserved to Hen. 8. He died before any made. The power devolved to Edw. 6. Same evidence that K. Edw. gave statutes, as that there are any statutes at all, because recited in Qu. Elizabeth's. If that recital false, the Crown was deceived, and the whole grant is void. Objection. K. Edward's statutes never acted under. There might be no opportunity to exercise the visitatorial power; therefore no argument can be drawn from non-user. Nor has the Crown ever acted as visitor. 3. As to the circumstances of this case, a probable ground is sufficient to grant a *mandamus*. *K. and Ward*, H. 4 Geo. 2(y), *mandamus* to admit an officer: return that the office was full: held bad, because the *mandamus* gives no right, but only a possession in order to try the right. So here, Dr. Vernon only desires to put the right in a method of trial. It would therefore be no inconsistency, should a *mandamus* go first, and a prohibition afterwards; for this is only a mode of trial, and if the Bishop be really visitor, Dr. Vernon has no other way of trying it. Court will not grant a *mandamus* * to put the sentence of an inferior Court in execution, and therefore quashed the *mandamus* to Dr. Walker, H. 9 Geo. 2(z). And in the *K. and Bishop of Ely*, T. 11 Geo. 2(a), the Court did not think the statutes of K. Edw. sufficiently established, to put a sentence in execution by virtue of them; but this was a different case from the present, which only demands a trial, not an execution.

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Per Cur'. LEE, C. J.—It is an improper question for the Court to enter into, upon affidavits, whether these statutes are in force. It was much controverted in 1736, and then not settled. Nor will we now determine the power of granting *mandamus*'s to visitors. Dr. Usher's Case is ill reported in 5 Mod. 452. It was a motion for a *mandamus* to the visitors of University College. Two questions were argued. 1. Whether the persons to whom the *mandamus* was prayed, were real visitors. 2. Whether a *mandamus* would go. The Court considered only the first; and it went off for the consideration of the Court. At present, it does not appear clearly to the Court, that the Bishop is the visitor. And it would be unjust to force a man to exercise a doubtful jurisdiction, by *mandamus*. If he obeys, he is liable to prohibitions; if he returns himself not visitor, to actions. The Court never grants a *mandamus*, except it indisputably sees, that there is a power lodged in the person, to whom the *mandamus* is prayed. This was the foundation of the determination in the 11 Geo. 2, Pasch. 1738, *The K. and*

(y) 2 Stra. 893.

(z) Cas. temp. Hardw. 212; 1 Burn's E. L. 455.

(a) Andr. 176.

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Bishop of *Ely*, on the very same evidence as the present. When this right is settled, it is time enough to enter on the other question.

WRIGHT, J.—In *Brideoak's Case*, H. 12 Anne, the Bishop of Winchester had expelled *Brideoak* from a fellowship of Winchester College. He applied for a *mandamus* to restore him. It did not appear clearly that the Bishop was visitor, therefore the Court refused it; but by consent the right was tried by prohibition.

[*59] DENISON, J.—In case of private jurisdictions, the Court has inclined not to intermeddle. There is no express determination, and no precedent of a *mandamus* granted to a visitor in any case, therefore it is certainly a doubtful question. As * to the present application, if we grant it, we may make a false suggestion. And it would be nugatory to grant a *mandamus* first, and a prohibition afterwards.

FOSTER, J.—It would be of ill consequence, to authenticate a body of laws, that have lain dormant for two hundred years. The case of the Mayor and Corporation of *Newcastle* is a strong one to shew, that the Court will not grant a *mandamus*, where it will introduce confusion and disorder.

Rule discharged *per tot' Cur' (b)*.

(b) See more as to visitors, *post*, 90 (a).

TRINITY TERM,—24 GEO. II. 1750.—K. B.

THE KING v. NOTTINGHAM.

Rule to inspect,
when grantable,
and how long in
force.

[*60] THERE had been a *mandamus* to fill up the Corporation, to which the Corporation made a return; and then a rule was made to inspect the books of the Corporation. Afterwards the prosecutors deserted that *mandamus*, and moved for a new one. And now Mr. *White* moved for an attachment against the mayor &c. for not obeying the rule to inspect the books. But the Court held, that the course was, in informations in nature of *quo warranto*, to grant such rule for inspection, pending the rule to shew cause; but in *mandamus's*, not till after the return (a); that on the return being allowed, the cause was at an end, and the rule of course expired; but if they *thought proper to bring an action for a false return, a new rule to inspect would be granted. So denied the present motion (b).

(a) *R. v. Hollister*, Cas. temp. Hardw. 245; *R. v. Justices of Surry*, Say. R. 145, acc. But *Ashurst, J.*, thought the rule should not be granted, till the rule for the

quo warranto was made absolute; in *R. v. Babb*, 3 T. R. 581.

(b) As to inspecting books, &c. in civil actions, see *Hodges v. Atkis*, *post*, 877.

JONES v. NEWMAN.

MOTION for new trial in ejectment, wherein the lessor of the plaintiff was heir at law; and the defendant's title arose upon a will, which devised the premises to John Cluer, of Calcot, under whom the defendant claimed. But the plaintiff gave evidence, that at the time of making the will, there were two John Cluers, father and son; and that therefore the devise was to the father, who died before the testatrix, and so the devise was lapsed. Upon which the defendant offered to prove, by parol evidence, that the testatrix intended to leave it to John Cluer, the son; but the Judge would not suffer it, and a verdict was found for the plaintiff. But *per totam Curiam*, the Judge was mistaken. The objection arose from parol evidence, and ought to have been encountered by the same.

Parol objections to a will may be encountered by parol evidence.

So granted a new trial (c).

(c) See Lord *Walpole v. Earl of Cholmondeley*, 7 T. R. 138, and *Stephenson v. Heathcote*, 1 Eden, 38, notes.

An ambiguity, *ambiguitas latens*, which is raised by extrinsic evidence, may be explained in the same manner; Lord *Cheyney's Case*, 5 Rep. 68 b; *Altham's Case*, 8 Rep. 155; Hob. 32; *Harris v. Bp. Lon-*

don, 2 P. Wms. 135; *Careless v. Careless*, 1 Meriv. 384. And if no direct proof can be made of the testator's intent, the devise will be void for uncertainty. As to parol evidence being admitted to explain written contracts, see *Preston v. Merceau*, post, 1249.

THE KING v. LORD MONTACUTE and Others.

S. C. 1 Wils. 283.

MOTION for a *mandamus* to Lord Montacute, lord of the manor of Midhurst, to hold a court baron; and to certain of the suitors, to compose a homage, and present some conveyances of burgage tenures within said manor; upon a suggestion by affidavit, that several conveyances were duly executed, and that at the general court in August last, they were offered to the homage, who refused to present them.

Mandamus will go to a lord to hold a court baron, and to the homage to present conveyances of burgage tenures, whether those conveyances appear to be legal or not.

Sir R. Lloyd, Mr. Hume Campbell, Mr. Green and Mr. Evans shewed for cause; that this was a dangerous precedent. *Mandamus* is never granted without some complaint of refusal. There is no refusal in the lord. He held his court regularly last August, therefore this *mandamus* would not lie at common law. Nor upon the stat. 11 Geo. 1, c. 4; for that gives no *mandamus*, except where the lord neglects to hold a court, or where something wrong is done at that court, when held (a). As for *the tenants; the homage is to present deaths and alienations upon oath; and the Court will never grant a *mandamus* to present a fact upon oath, except the fact be quite evident; if therefore the Court grants this, they will determine

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(a) "Vid. Rast. Entr. 342 b (*Fals Judgment*) where, in a writ of false judgment, the lord would not hold his court, and thereupon a *distingas* issued to compel him: and afterwards his suitors would not return

the proceedings, and thereupon a *distingas* issued to compel them. S. P. Fitz. Abr. *Faus Judgment*, pl. 7; *Smith v. Dean of St. Paul's*, Show. Par. Ca. 67." MS. Serj. HILL.

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upon motion the right of these burgage tenures. Many things are necessary to be done in order to present; they must enquire whether the alienation is according to the custom, whether a fair or fictitious transaction, &c. A homage is in the circumstances of any other jury. There is no instance, where a homage or jury have been commanded to find a particular fact. For the Court will not order persons to do a thing sinful, and if they present contrary to their persuasions, it is a sin. The Court last Term refused a *mandamus*, to swear in the Mayor of Camelford, without an affidavit that he was not sworn in already; otherwise *mandamus's* would be endless. The intendment of law is that every man will do his duty, till the contrary appears. No *mandamus* can therefore be issued against the lord. As to the tenants, the Court will not grant a *mandamus* to complete private rights, which these are; for the consequential privilege of sending burgesses to Parliament is immaterial: else a man might come here and pray a *mandamus*, to complete his title to a freehold of 40s *per annum* in a county. In the *K. and Clithero*, Comb. 239, a *mandamus* prayed to the jury of Clithero, to present two freemen to the bailiff, and for him to admit them. *Holt* said, We will grant a *mandamus* to the bailiff to admit; but not to a jury to present upon oath. This is also a *mandamus* moved for by five persons, and one writ of *mandamus* shall not include five several cases; *Salk.* 433, Case of *Andover*. If a lord refuses to hold a court or to admit, the only remedy is by subpoena in Chancery; 4 Rep. 28; 2 Cro. 368; Moor 842. If a copyholder refuses to present what is given in evidence, it is a forfeiture of his copyhold; 3 Leon. 109; *Dyer* 211 b. The same in a court leet; Stat. 4 Edw. 1. There is no instance of a *mandamus* to hold a court on any particular day, except in boroughs for the admission of officers, in furtherance of public justice. And wherever a *mandamus* has gone to admit freemen, it is where they have an inchoate right by birth or servitude; but here, there is no inchoate right. Nor will the end proposed be *certainly attained by this unusual method. Though a presentment should be made, yet the lord is not always bound to admit on presentment; as if an alienation is made to a corporation, a Court of Equity will not compel the lord to admit them on presentment, because he may lose his services.

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MR. Bathurst, Mr. Henley, Mr. Ford and Mr. Joddrell, in support of the rule argued, that this was not merely a private right; the public are deeply concerned in it. All burgage tenures are of the same nature. The presentment required is only relative to the franchise of voting; the estate and freehold are vested sufficiently without it. If no presentment be made, the franchise only is lost, and not the estate. A *mandamus* is the proper method to enforce the King's charter, *Wheler and Trotter*, P. 8 Geo. 2. We have shewn a refuser in the jury, and it is not necessary to shew, that every person concerned has refused. *Mandamus* is certainly necessary to the homage;

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but that would be nugatory, except one also goes to the lord to hold a court. If you grant the end you must grant the means. *K. and Christchurch*, M. 12 Geo. 2, (a) a *mandamus* was granted to the steward of a court leet to hold one, and to the jury, to present to the steward one *Day*, who was chosen Mayor. The Case of *Andover* (as to five in one writ) was, where there were separate grievances: here, the grievance is one and the same to all. But the Court *will judge how many writs are necessary, and grant them accordingly. *Objection*, No instance of *mandamus* to hold a court baron, but that 2 Roll. Rep. 107 is against it. *Solution*, The sole question is, Whether it be for the public good or no; if it be, the Court will grant it for courts baron as well as leets. As to the jury being on oath, the oath is the common oath of homagers; but this presentment is not made by them *quatenus* homagers, but as tenants of a franchise vested in them by the Crown. Every officer of a corporation takes a general oath to do his duty. That will not preclude this Court from sending him a *mandamus*. In *K. and Lord Mayor of London*, a *mandamus* went to him to return one *Brockhurst* (who was chose alderman) to the court of aldermen, and also to the court of aldermen to admit him. In the *K. and Clithero*, a MS. note under the name of the *K. and Willis* (b), states that a *mandamus* at last went to the bailiff and jurors to present and admit. The oath is so far from being a reason against the *mandamus*, that it is a strong reason for it; for the jury are bound to present alienations, and the Court only forces them to carry their oath into execution. The cases in *Leon. and Dyer* (c) prove, that juries on their oaths may be punished by amercement and forfeiture; *a fortiori* this Court may interpose by way of direction, as in cases of *mandamus* to spiritual judges, to grant administration (d), and to archdeacons, to swear in churchwardens (e). In *Bagg's* case, 11 Rep. 98 (f), it was resolved, that this Court has authority to correct all errors judicial or extrajudicial; so that no wrong or injury either public or private can be done, but that it shall be reformed by due course of law.

The Court directed a search to be made for the *K. and Clithero*, and it was found, that a *mandamus* had gone *ballivis et jurat'* (with a dash) M. 5 W. & M. to present and swear in two persons.

Sir *R. Lloyd*, in reply, observed; that no *mandamus* had ever gone to officers in their *judicial*, but only in their *ministerial* capacities (g). This is an answer to all their cases. *Mandamus* has indeed gone to direct an exertion of their judicial capacity, as to grant admission (h); but not *how* they shall * exert it, as to

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(a) Or *R. v. Willis*, Andr. 279.

(b) This must be a mistake, for they are quite distinct cases.

(c) Cited *ante*, 61.

(d) *R. v. Dr. Hay*, post, 640.

(e) *R. v. Dr. Harris*, post, 430.

(f) See post, 78.

(g) This was one of the grounds of

granting a *mandamus* in *R. v. Bp. of Ely*, 2 T. R. 290, post, 90, n. (h) *S. C.*

(h) By 12 G. 3, c. 21, s. 1, "where any person entitled to be admitted a citizen, Burgess, or freeman of any city, &c. shall apply to the mayor, &c. to be admitted, and the mayor, &c. shall not admit him within one month after notice, a man-

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whom they shall grant admission. So in the case of the Mayor of London, the mayor and aldermen are only canals, and could not exert any judgment. In the *K.* and *Willis* alias *Christchurch*, the case was agreed, and nothing finally done. In the *K.* and *Clithero*, the *mandamus* never went to the jury to present. It went to the bailiffs and jury jointly, by their own account.

Per Cur'. LEE, C. J.—We have at present no ground to think, that these were legal conveyances; rather the contrary; *non constat* that they have *jus ad rem*. But if they have it, the right of voting for members is surely a noble privilege, as *Holt* C. J. said, in case of *Ashby* and *White*(i). And where a man has *jus ad rem*, it would be absurd, ridiculous, and a shame to the law, if he could have no remedy; and the only remedy he can have is by *mandamus*. I think the cases, especially the *K.* and *Christchurch*, extremely strong; and don't see, that the act of the jury in the present case, is a whit more *judicial* than that. After the right is settled, the presentment is *ministerial* only. In the *K.* and *Christchurch*, the presentment is grounded on an election previous; in the present, it is grounded on the conveyances precedent. The *K.* and *Clithero* also shews, that a *mandamus* was granted to an enquiring jury. As to putting them all, the bailiffs and jury, together, it must be taken, *reddendo singula singulis*. I am therefore of opinion on the whole (it being absolutely necessary on the reason of the thing) that a *mandamus* should go, to force them either to exert their duty, or shew cause to the contrary. If they can shew that there has been no alienation, that will be a good return. The legality of the alienations belongs to another jurisdiction.

WRIGHT, J.—Old Nat. Br. 3 e. 12 b(k). French 4to edition, *mandamus* may go to a lord of a manor, to hold court baron to do justice to his tenants(l).

Rule absolute, *per tot. Cur'*. with leave to sue out one or more *mandamus's*.

damus shall issue to compel him, and he shall pay all costs."

(i) Salk. 19.

(k) Ff. 6, 26, (8th ed. 4to.)

(l) The Court will grant a *mandamus* to the lord of a manor to admit a copyholder; but not where he claims by *descent*, as in that case he has a complete title without admittance against all but the lord; *R. v. Bennett*, 3 T. R. 197; so if the lord refuse to admit a person, to whom a copyhold is surrendered, on account of a disagreement about the fine, the Court will compel him; *R. v. Lord of Hendon-manor*, Id. 484; so

the Court will grant a *mandamus* to burgesses to attend a court leet to make a jury; *Rector of Wigan's Case*, 2 Stra. 1207; so to compel the lord to hold a court leet, and court baron in the accustomed place; *R. v. Grantham*, post, 716. But though a *mandamus* lies to the lord to hold a court leet, yet it lies not to jurors by name to appear and form a jury; *R. v. Bankes*, post, 452; ante, 26, n. (o); Bac. Abr. *Mandamus* (D); Com. Dig. *Mandamus* (A); and see *R. v. F. Rigge*, 2 B. & A. 550. See also *R. v. Barker*, post, 300, *R. v. Cambridge Univ.* post, 547.

MICH. TERM,—30 GEO. II. 1756.—K. B.

ROLLS v. BARNES.

S. C. 1 Burr. 9; 1 Ld. Kenyon, 391.

IT was held by the Court, on the authority of *Adderley and Evans*, H. 29 Geo. 2(a), that *insimul computassent* was no good plea in bar to an action on *assumpsit*; for, though true, it does not extinguish the original promise on which the action is founded (b).

Insimul computassent no bar to *assumpsit*.

(a) That was *assumpsit* by an executor for £— due to the testator for work and labour, &c.: plea, that testator and defendant accounted together, and that defendant was found in arrear 12l., and had paid 10l. to testator, and remaining 2l. to plaintiff: judgment on demurrer for the plaintiff; 1 Ld. Ken. 250.

(b) It appears from the report in 1 Ld. Kenyon, (which is the fullest) that the defendant pleaded a stated account before the bill filed, and a balance in favour of himself, and that the plaintiff promised to pay such balance; and *Denison*, J., said, that "a promissory note would not be pleadable in bar to this action, as it is not a demand of a higher nature; no more than one bond is pleadable in bar to another:" 1 Burr. 9, S. P. But where in *assumpsit* for goods sold, the plea was, that the defendant, being the payee of a promissory note, indorsed it to the plaintiff, and that the plaintiff received it "for, and on account of the said debt;" and on general demurrer it was urged, that the plea should have alleged, that it was received in satisfaction of the debt; the plea was, however, held good; *Kearlake v. Morgan*, 5 T. R.

513: and in support of it, *Richardson v. Rickman*, was cited; there, in a similar action, the defendant pleaded an account stated, and that he was found in arrear, for which the plaintiff drew a bill on him, and delivered it to A. B. the payee, which bill the defendant afterwards accepted. On demurrer, Ld. Mansfield said, that a bill of exchange, unless there was an agreement that it should be so, was no satisfaction, but that this was a bill accepted by the party and negotiable, and that was payment: judgment for the defendant. *Bailey*, J., said, "that *Kearlake v. Morgan* was an authority to shew, that if a debtor pay his creditor by a note or bill, which the creditor takes on account of his debt; such taking of a bill will be an answer to an action brought by the creditor against his debtor for that debt, unless the creditor gives up the bill; *Rowe v. Young*, 2 Brod. & Bing. 245. And see *Dangerfield v. Wilby*, 4 Esp. N. P. 159; *Norris v. Aylett*, 2 Camp. N. P. 329; see also *Wilkins v. Casey*, 7 T. R. 713, per Ld. Kenyon, and the form of such a plea in 2 Chitty's Plead. 483 (2d ed.): also *Pring v. Clarkson*, 1 B. & C. 14.

COOPER v. CHITTY and BLAKISTON.

S. C. 1 Burr. 20; 1 Ld. Kenyon, 395.

TROVER against the Sheriffs of London, by the assignee of one Johns, a bankrupt, for goods sold by them under an execution. It was stated that on the 4th of December, 1753, Johns became a bankrupt; on the 5th of December, the judgment was entered against him by Godfrey, and the *feri facias* was executed the same day: On the 8th of December, the commission was taken out; the same day assignment made: On the 28th of December, 1753, the defendants sold the goods; and on the 20th of January returned, that they had levied the money.

Sir R. Lloyd, for the plaintiff argued, that the question was, in whom the property of the goods was. That the Sheriff can neither sell nor take goods, in which the defendant has no property. If he does, trover will lie against him. Two times are

If a Sheriff takes goods of a bankrupt in execution after the act of bankruptcy, and before the commission issued, and sells them after the commission, trover will lie against him. *Vide Timbrel and Mills*. Hil. 33 G. 2d. 1760. p. 205.

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to be attended to; 1. Of seizure, 2. Of sale. 1. The goods were seized the 5th of December; but after the 4th of December, the defendant had no absolute property left in him. If it be asked, Where is the property at that time? The answer is, the books are confused about it. In *Player's Case*, Salk. 111, *Holt* is unintelligible, who says the assignees are in by relation, after the commission taken out. But the question recurs, Where is the property in the interim? It is certain, that the Sheriff cannot seize more property than the defendant has. It seems therefore reasonable, that the Sheriff may seize this imperfect property, and nothing more. The bankrupt has a *special property, like a carrier, &c. Or, he has a defeasible property, like a distrainer for rent: Or, he has a right of custody, for the benefit of all his creditors. This case differs from an execution and seizure *before* the act of bankruptcy, because then the defendant has the absolute dominion of the goods. 2. It is to be considered, whose the goods were at the time of sale. After the assignment, the property is in the assignees; 1 Vent. 193. The Sheriff on the 5th of December seized a defeasible property: The assignment on the 8th of December defeated that property, by vesting an absolute property in the assignees. *Objection*. The relation back is a fiction of law, and therefore shall not damage a third person. *Answer*. This is not universally true. And, if true, it only relates to fictions arising from construction of the Judges, and not such as are created by express act of Parliament. Besides it was absolutely vested before the sale. *Objection*. What return then could the Sheriff make, who had taken the goods before assignment? *Answer*. He might have returned *nulla bona*, K. against *Brein & al*, bailiffs of the *Savoy*, 1 Keb. 901. *Objection*. The Sheriff might not know of the assignment before the sale. *Answer*. It is his business to know it, he is paid for knowing it (c). Want of knowledge is no justification in a civil action. But probably, he did know of the act of bankruptcy. It is incredible, he should not know of the commission. *Objection*. Action shall be brought against the original plaintiff Godfrey, or against the vendee; and not against the officer. *Answer*. There is no reason to proceed against them, but what will equally hold against the Sheriff: for their property, if bad, depends upon the Sheriff's want of power to assign it to them. *Objection*. *Bailey* against *Bunning*, 1 Lev. 173, 1 Sid. 272; on a similar action, the *feri facias* was tested the 4th of June, but not sued out till the 11th of June. An act of bankruptcy was committed on the 6th of June; the Sheriff took the bankrupt's goods in execu-

(c) The sheriff is bound to execute the writ at his peril: and if he have any doubt about the property of the goods, it is said, he may summon a jury to inquire that fact; Dalt. Sher. 146, c. 30; Gilb. Executions, 21; *Farr v. Newman*, 4 T. R. 633, 648. But the return of such an inquisition is traversable; and though perhaps it might be evidence in mitigation of damages in *tres-*

pass against the sheriff, yet in an action on the case for a false return, an inquisition finding goods to be the property of a third person is not admissible in evidence; *Glossop v. Pole*, 3 M. & S. 175; neither would it be so in *trover* against the sheriff; *Lastow v. Eamer*, 2 H. Bla. 437; where the Court doubted, whether the sheriff can legally hold such an inquisition.

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tion. Trover against the Sheriff. And, on the case stated, judgment for the defendant. *Answer.* At that time, the goods were bound from the teste of the writ, and not from the emanation of it; and at the teste, the property was clearly and absolutely in the bankrupt: therefore no wrong done. But here, the bankruptcy commenced before the teste.

Mr. *Morton*, for the defendant, argued, that the relief should have been against the plaintiff in the original action. He has given the bankrupt equal credit with the rest of the creditors, and should not be suffered to gain a preference in prejudice of the rest. Allowed, that by 2 Stra. 981, in the case of *Brassey v. Dawson*, execution after act of bankruptcy and before assignment is void; yet 1 Lev. 95, if even a judgment be set aside for irregularity, no relief can be had against the officer, who acts under the sanction of the Court. The foundation of the action of trover is property in the plaintiff at the time of conversion, and that the conversion was tortious. But both in *Carey v. Crispe*, Salk. 108, and *Brassey v. Dawson*, it is held, that the property remains in the bankrupt till assignment; the seizure therefore is justifiable. And no fictitious relation shall turn this into a tort. If seizure is justifiable, the sale must be so too; for the seizure vested a special property in the sheriff; *Clerk v. Withers*, Ld. Raym. 1076; so too Cro. Jac. 515; Cro. Eliz. 440; Cro. Car. 457; Hob. 206; March. 13. The law considers the whole execution, seizure, and sale, as one act. The sheriff may seize and sell on the same day, and pay the money to the plaintiff; his deferring the sale shall not make him liable to the assignee; since he would not have been so, had he completed the execution immediately; Cro. Eliz. 597; 6 Mod. 293. The sheriff can make but five returns to this writ of *fiери facias*. 1. *Nulla bona*, which would be a false one. 2. Bringing money into Court. 3. That he has paid it to the plaintiff. Both these must be founded on a prior sale, which is argued to be a conversion. 4. That he has delivered the goods to the assignee; which he has no right to do, without a jury to find a property in such assignee. 5. That the goods remain unsold; which is only a temporary matter of excuse. If an action be brought against the sheriff, by the original plaintiff, for detaining the goods; can he plead the bankruptcy? He cannot, for he has it not necessarily in his power, to prove the act of bankruptcy, the commission, and other parts of that transaction. There are two cases in point for the sheriffs; *Leckmere v. Thorowgood*, 3 Mod. 236, 1 Show. 12, Comb. 123; and *Bailey v. Bunning*, 1 Lev. 173: in which it is also stated, that the officer had notice of the bankruptcy.

Lord MANSFIELD, C. J., delivered the opinion of the Court. The bare defining an action of trover will go a great way towards understanding, and solving this question. The form of the action is a fiction, but in substance it is a remedy, to recover property wrongfully converted to another's use. The form supposes the defendant might come lawfully by it; and if he did not, yet by bringing this action, the plaintiff waves the

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trespass. No damages are recoverable for the act of taking, all must be for the act of converting; this is the tort, or *maleficium*. And, to entitle plaintiff to recover, two things are necessary: 1. To shew a property in himself; 2. To shew a wrongful conversion by the defendant (*d*).—1. In the present case it is admitted, that the property was in the plaintiff, the assignee, from 4th December (*e*); therefore it was so before the seizure, and notoriously so before the sale. It was so before seizure by relation back; a doctrine established to prevent fraud, and which, though it may sometimes occasion particular inconveniences, yet is considered by the statutes as conducive to the general good of the public. The statutes therefore make all conveyances and acquisitions of property void, by, from or under the bankrupt, and the property of the assignees to be good and valid, against even all executions not executed before the act of bankruptcy committed. The acquisition of property by act of law has the same operation, as an acquisition by the act of the party: if it be completed before the act of bankruptcy, it is good; if not completed, it is otherwise. The stat. 19 Geo. 2 (*f*) relieves as to contracts in two particular cases, and then only; otherwise the statutes rescind every contract made or completed after the act of bankruptcy. And in the present case, they do not make the original taking of the goods in execution unlawful, or a trespass *ab initio*, but only by relation preserve a property of the goods in the assignees, previous to the taking, in order to divide them rateably among all the creditors.—2. To shew a wrongful conversion by the defendants, it must be considered, 1st, Whether the conversion itself is wrongful; 2dly, Whether defendants are so far excusable herein, that the remedy as against them is misdirected.—1st, The conversion or act of sale is clearly wrongful. The sheriff had a right to sell the goods of Mr. Johns, but not *to sell the property of the plaintiff. The Court of Chancery, in such a case, would arrest the goods, in a summary way. The vendee can maintain no title to the goods, under the sale of the sheriff, which proves the action of sale to be wrongful; neither could the plaintiff in the original action finally retain the money, arising from such sale.—2dly, The defendants are not excusable. Three weeks intervened between the assignment and sale, and the return was not made till near a month farther. The notoriety is extremely great. But had the sale been immediately after the seizure, still the sheriffs would have been liable (*g*). The return they have made is false, that they have made so much, “of the goods of —Johns;” whereas they were not the goods

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(*d*) As to the action of trover, see *Wilbraham v. Snow*, 2 Wms. Saund. 47 a, n. (1); *Taylor v. Wells*, Id. 74, n. (1).

(*e*) See *Hitchin v. Campbell*, *post*, 827.

(*f*) Ch. 32, s. 1: that is, in respect of goods sold or bills of exchange drawn by a bankrupt. But that act is now repealed by stat. 6 Geo. 4, c. 16, which provides (s. 82), that all *bona fide* payments made

by or to a bankrupt before the date and issuing of a commission shall be valid, notwithstanding a prior act of bankruptcy: and that a creditor, to whom such payment shall be made, shall not be liable to refund the same to the assignees, provided the person so dealing with the bankrupt had not notice of any act of bankruptcy.

(*g*) *Timbrell v. Mills*, *contra*, *post*, 206.

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of Johns, but of the assignees. Doubting, whether they could return *nulla bona* is arguing in a circle. "They could not return *nulla bona*, because they were the bankrupt's; they were the bankrupt's goods, because the sheriff could not return *nulla bona*." Therefore we are all of opinion, that the plaintiff must recover. The ingenuity of the defendant's counsel has thrown a veil over the reason of the case, by starting some plausible objections. *Objection 1st.*—An execution is an entire thing, and when once begun must be completed. This execution was lawfully begun, and therefore must be completed.

Answer.—All the cases put and cited are between the plaintiff and defendant, and do not relate to the taking the goods of a third person. If a sheriff takes the goods and dies, his executors must complete the sale: if the plaintiff dies, his executors may demand to have the execution completed: writs of error cannot supersede an execution on a *fieri facias* actually begun; because the goods are of a perishable nature, and must not wait the determination of the suit: a vendee upon a lawful judgment and execution thereupon, shall not lose his property upon a reversal by a writ of error; so held in *Matthew Manning's Case*, 8 Co. 97. But none of these allow the sheriff to take the goods of a third person. The fallacy of this argument lies *in the equivocal use of words. The taking is said to be *lawful*; but *how* lawful? against the assignees? Impossible, in any sense; so as to gain the property. No: the word *lawful*, means no more, than that the sheriff shall not be held a criminal or wrong-doer, by the relation of the statutes; he is not a trespasser. As if the sheriff arrests one who says he is A., but is not so; the sheriff's taking him is lawful; but his detaining him after the truth is discovered, would be unlawful (*h*). The case of *Bailey v. Bunning* only proves, that the *taking* of the goods under the writ, though after an act of bankruptcy, yet before the commission, was lawful; that the officer was no trespasser in so doing, this being sufficient to excuse him. This case is so explained *per Cur.* in *Philips v. Tomson*, 3 Lev. 192. Siderfin did not know what the Court went upon (*i*). *Lechmere v. Thorowgood*, was an action of trespass for a tort. So explained in Shower, which is the only clear state of it. Also Comberbach says, it was held, that the officer should not be made a trespasser, by this relation back. There is also *Cole v. Davies*, Ld. Raym. 724, which says, no action will lie against the sheriff, acting under process, but solely against the vendee. This is a mere obiter note, taken at *Nisi Prius*, when the reporter was a very young man. And it seems to have been collateral to the case in hand; which turned upon a supposed

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(h) See *Sanderson v. Baker*, post, 832.

(i) Wherever trespass for taking goods will lie, trover will also lie; for one may *qualify* but not *increase* a tort; *Bishop v. Montague*, Cro. Eliz. 824; *S. C.* Cro. Jac. 50; *Branscomb v. Bridges*, 1 B. & C. 145: but the converse of the proposition does not hold, for trover may often be brought,

where trespass cannot; as where goods are lent, or delivered to keep, &c.; *Pitt v. Rawsterne*, Sir T. Raym. 472; *Lechmere v. Toplady*, 2 Vent. 170; *Smith v. Milles*, 1 T. R. 475; see 2 Wms. Saund. 47 k; and as to the distinction between trespass and trover, see *Ward v. Macauley*, 4 T. R. 489.

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collusion, between the plaintiff and defendant; as may be conjectured from the fourth resolution therein. *Objection 2d.*—It would be inconvenient, if a sheriff is not allowed to justify the sale of goods, after a commission of bankruptcy, which he has taken before. *Answer.*—If the sheriff has any doubt, he may insist on an indemnity from the party. But it is said, it would be hard to make the sheriff prove the commission, act of bankruptcy, &c. Not at all; for, by a bill of interpleader, he might make the original plaintiffs and the assignees settle that matter between themselves. The inconvenience would be greater on the other side. The doctrine of relation may be hard upon the sheriff, but less hard than on any other third person, for he has his remedy over. And the inundation of frauds, which would otherwise be let in, requires the establishment of this doctrine. Every bankrupt, after the act committed, would give over his goods to some favourite creditor, by means of a legal execution.

Judgment for the plaintiff (k).

(k) This case was fully recognised and confirmed in *Smith v. Miles*, 1 T. R. 475; where it was held, that *trespass* will not lie against the sheriff, for taking the goods of a bankrupt in execution after an act of bankruptcy, and before issuing the commission, notwithstanding he sells them after commission issued, and after notice of a provisional assignment. And see *Clarke v. Ryall*, *post*, 642.

Where a *feri facias* is levied the same day that an act of bankruptcy is committed, the Court will take notice, at what time of the day each took place; for the validity of the execution depends on the priority; *Thomas v. Desanges*, 2 B. & A. 586; *Sadler v. Leigh*, 4 Camp. 197, S. P. This seems to be the only case, in which the

Court will notice the fraction of a day; see *R. v. Adderley*, 2 Doug. 463; *Galton v. Wigley*, Ca. temp. Hardw. 208; *Combe v. Pitt*, *post*, 439: See also *Swain v. Morland*, 1 Brod. & B. 370, 3 B. Mo. 740, S. C. But now, by stat. 6 Geo. 4, c. 16, s. 81, executions against the goods of a bankrupt, *bond fide* executed more than two calendar months before issuing the commission, shall be valid, notwithstanding a prior act of bankruptcy, provided the person at whose suit the execution shall have issued, had not notice. And in case of a commission superseded and a new one granted, no execution to be valid, unless executed more than two calendar months before the first commission.

THE KING v. The Bishop of ELY.

S. C. 1 Burr. 158; 1 Lord Kenyon, 441.

Visitor of an ancient college is visitor also of ingrafted foundations; unless a special visitor is appointed: notwithstanding a remedy by distress is also provided for by the new founder.

MOTION for a prohibition to the Bishop of Ely, to restrain him from proceeding, as visitor of St. John's College, Cambridge, in a cause of appeal, promoted by Thomas Todington, clerk, against the election of William Craven into one of Dr. Keton's fellowships, in the said College. It was suggested upon affidavits *hinc inde*, that the College was founded by Margaret Countess of Richmond, who consigned the completion of it to Fisher, Bishop of Rochester, and he finished and gave it a body of statutes, 2 Hen. 8. The College is erected on the scite of an old priory, formerly under the jurisdiction of the Bishop of Ely; and in Fisher's statutes, there is the following clause, which is omitted in the subsequent statutes after mentioned, *viz.* "*Cap. de Visitatore. Præter hunc visitationis modum, nos alium nullum Episcopo Eliensi concedimus, sed*

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"nec a sociis tolerari permittemus aliquo pacto; quod etiam iis mandamus per vim sui juramenti. Scimus enim quod eximia Virago Domina Fundatrix impetravit ab Eliensi Episcopo, qui tunc fuerit, jus foundationis ea quidem ratione, ut ex desolatis Ædiculis tam illustre Collegium erigeret; quod cum consummaverit, par est, ut Elienses Episcopi nihilo majorem in hoc Collegio sibi vendicent auctoritatem, quam in cæteris Collegiis Academiæ, ubi non sunt fundatores" (1).

Afterwards, Queen Elizabeth, as heir to the foundress, gave the College a new body of statutes, in many respects similar to *Fisher's; but without the foregoing clause. The passages relied on by either side, out of these statutes, in the present case, were principally the following:

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"*Cap. 2. De Electione Magistri.*—Si [electores] de uno aliquo non consenserint, tum ad Collegii visitatorem veniatur; et ille pro magistro habeatur, quem solus visitator duxerit præficiendum.—Et dictus visitator eundem intra 20 dies, &c.—Quibus per Episcopum Eliensem dicti Collegii visitatorem non observatis, tunc ad summum Academiæ Cancellarium pertineat pro illa vice magistri nominatio."

"*Cap. 11. De Electione Præsidis et aliorum Officiariorum.*—Is erit electus, quem magister, si intra regnum Angliæ fuerit, nominaverit; quod si extra regnum fuerit, tum is quem Episcopus Eliensis, dicti Collegii visitator, intra regnum existens; vel absente aut sede vacante, quem Academiæ Cancellarius, nominaverit, &c."

"*Cap. 18. De Electione Sociorum.*—Eodem modo procedatur quo supra, &c."

"*Cap. 45. De Modo procedendi contra Magistrum criminis, &c.*—Si major criminosus, &c. sponte cedere noluerit; denunciabitur Episcopo Eliensi, vel, eo in remotis agente seu sede vacante, Cancellario dictæ Universitatis; vel eo extra Universitatem existente, præpositis Collegiorum Regis, Trinitatis, et Christi, &c. Episcopus vero Eliensis vel, &c. de criminibus, &c. summarie et de plano et extrajudicialiter cognoscat, et magistrum ab officio suo removeat &c., cessantibus appellationis, recusationis, querelæ, aut cujusmodi alterius juris aut facti, remediis."

"*Cap. 50. De Ambiguis et Obscuris interpretandis.*—Abrogatis igitur quibusvis aliis statutis, pro hujus Collegii gubernatione, prius excogitatis, hæc præsentia tum vera tum salubria pronunciamus. Reservata nobis nihilominus potestate vel adjiciendi, vel minuendi, mutandi, &c.—Quod si forte Cancellarius, aut Vice Cancellarius, aut Episcopus Eliensis, aut demum quisvis alius contrarium attentaverit, et novum

(1) Colleges in the universities were certainly considered by the popish clergy, under whose direction they were, as ecclesiastical, or at least as clerical corporations, and therefore the right of visitation was claimed by the ordinary of the diocese. And in some of the colleges at Oxford, where no special visitor is appointed, the

Bishop of Lincoln, in whose diocese Oxford was formerly comprised, has immemorially exercised visitatorial authority. And possibly the Bishop of Ely's visitatorial power at Cambridge may be derived from the same source. But Mr. Christian doubts the latter supposition; 1 Bla. Comm. 482. See post, 86.

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“ aliquid sta* tutum adhibere molitus fuerit; ab ejus obligatione
“ (autoritate nostra) magistrum, &c. penitus absolvimus, eisque
“ interdiciamus, ne pareant admittantve quovis pacto, sub poena
“ perjurii et omotionis perpetuæ. Quod si inter magistrum et
“ socios, aut inter ministrum et socios, aut inter ipsos socios
“ aliosve quoscunque nostri Collegii, super aliquo articulo sta-
“ tutorum nostrorum dubium aliquid oriatur, cujus decisio intra
“ 8 dies nequiverit inter eos haberi; tunc volumus, ut partes
“ dissidentes duos eligant, qui reverendissimum Episcopum
“ Eliensem pro tempore existentem (in quo sinceram fiduciam
“ ponimus, quemque juxta planum, communem, literalem et
“ grammaticalem sensum, et ad dubium pertensum aptiorem,
“ omnes hujusmodi ambiguitates interpretaturum, dissoluturum,
“ declaraturum, arbitramur) ubicunque intra regnum Angliæ
“ fuerit, adeant, vel saltem totam controversiam in scriptis eidem
“ reverendissimo patri significant: cujus quidem reverendissimi
“ Episcopi determinationi, interpretationi, et declarationi super
“ prædicto dubio ita, ut præfertur, disputato, ac ad eum delato,
“ faciendis, magistrum, præsidem, socios, &c. omnes dicti Col-
“ legii obtemperare volumus, et cum effectu parere. Visita-
“ tionem autem hujus Collegii reverendissimis in Christo pa-
“ tribus Episcopis Eliensibus commendamus; quibus et con-
“ cessimus cujusdam idonei præsentationem, qui sit futurus in
“ hoc Collegio socius. Idoneum autem intelligimus, qui quali-
“ tates habeat easdem, quæ describuntur in statuto de qualitate
“ sociorum: neque enim alium quempiam recipi volumus a Col-
“ legio. Neminem autem illi præsentent, nisi talem qui pro
“ suis meritis hoc sodalitie dignus fuerit, et qui cum statutis
“ per omnia conveniat.”

[*74] “ CAP. 51. DE VISITATORE.—Nos igitur fiducia benignitatis
“ reverendissimi in Christo patris Episcopi Eliensis, qui nunc
“ est, et successorum suorum, freti, confisque, quod hæc nos-
“ tra statuta, perpetuis futuris temporibus, inviolabiliter, ad
“ laudem Dei et honorem Collegii, observari procurabunt et
“ nitentur, et ea vel eorum aliqua, contra nostram mentem et
“ sanctissimum piæ fundatricis institutum, minime violari pati-
“ entur; statuimus, &c. ut Episcopus Eliensis, qui pro tempore
“ fuerit, *quoties* per magistrum et quinque ex senioribus, sive
“ per septem seniores, reluctantante magistro, *requisitus fuerit*,
“ ad Collegium valeat et possit accedere; magistrum, &c. convo-
“ *care; Collegium tam in capite quam in membris visitare;
“ ac de et super omnibus et singulis, statum, commodum, ho-
“ norem et dicti Collegii statuta, magistri, præsidis, decanorum,
“ thesaurariorum, sociorum, scholarium, discipulorum et mini-
“ strorum reformationem et correctionem concernentibus dili-
“ genter inquirere; juramenta exigere; crimina &c. in ea visi-
“ tatione comperta debite punire, corrigere et reformare; ac
“ jurisdictionem suam ordinariam (quam volumus et hoc statuto
“ nostro ordinamus ad eundem Episcopum Eliensem, et suc-
“ cessores suos, in perpetuum spectare et pertinere) in magis-
“ trum et socios dicti Collegii exercere; cæteraque omnia et
“ singula facere et exercere, quæ ad eorum correctionem et

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“ reformationem sunt necessaria, aut quovismodo opportuna, etiamsi ad privationem seu amotionem magistri, præsidis, &c. contingat. Eum autem volumus, visitatione semel incepta atque inchoata, quam cito commodè poterit, causas omnes dijudicet et determinet, ac finem visitationis suæ omnino intra quindecim post ejus ad Collegium accessionem dies faciat. Correctionem debitam quilibet subeat, cessantibus quibuscunque provocationibus, appellationibus, querelis et aliis juris et facti remediis. Dissolutaque visitatione, pro esculentis et poculentis expensis, oneribus et procurationibus, ratione visitationis hujusmodi, debitis, volumus et statuimus, quod summa pecuniaria, in bonæ memoriæ Jacobi olim Eliensis Episcopi concessionibus et ordinationibus limitata et declarata, absque dilatione qualibet solvatur. Reverendissimi vero patris Episcopi Eliensis conscientiam apud altissimum oneratus, ut—visitationis, inquisitionis et reformationis officium diligenter impendat, et fideliter in omnibus exequatur.”

After the first statutes, and before the promulgation of the second, by indenture, 27th October, 22 Hen. 8, between Sir Anthony Fitzherbert, and John Keton, D. D. of the first part, the Chapter of Southwell, Co. Nottingham, of the second part, and St. John's College, of the third part, it was agreed, “ That Dr. Keton should have two fellows and two disciples sustained at the costs of the College for ever, of his foundation, over and above the number of fellows and disciples then founded, with the same emolument and advantages as other fellows and scholars of the said College, and an additional stipend of 13s. 4d. *per annum*, to each of said two fellows. *That Sir Anthony Fitzherbert and Dr. Keton, or the survivor of them, should have the visitation of the said fellows and scholars, during their respective lives, and after their decease, the College should have the election according to such written ordinance as Dr. Keton by will, or otherwise, should make or declare: Proviso, that the said fellows and scholars should be elected out of such as are or have been choristers of Southwell, if any fit person could be found born in Southwell; and in default of such, then out of such as have been choristers of Southwell, and were then resident in the University of Cambridge; and in default of such; then out of the most singular in manners and learning, of what country soever, then resident in Cambridge. That the master, fellows and scholars of the old foundation, as well as the new, should take an oath to observe Dr. Keton's statutes, so as the same were agreeable to those ordained by the foundation of the College. In consideration of all which, Dr. Keton had given and paid to the College 400*l*. And it was agreed, that if the College should fail in taking, admitting, receiving or maintaining the said fellows and scholars, according to the said ordinances and agreement, they should forfeit to Sir A. F. and Dr. K. and the Chapter of Southwell, in the name of a penalty, 20*s*. for every month that the said fellows, &c. were so excluded, restrained, &c. for which, they should be

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"at liberty to distrain in the manors of Marslete, &c. belonging to the said College." Dr. Keton made no other statute or ordinance than was contained in the said indenture.

Toddington had appealed to the Bishop of Ely, against the College for rejecting him when candidate for one of these fellowships, though he had been a chorister of Southwell, and was otherwise well qualified; and the Bishop had cited the College; whereupon this prohibition was prayed.

Mr. *Yorke*, Solicitor-General, Sir *R. Lloyd*, Serjeant *Hewit* and Mr. *Parrot* shewed cause; and they stated that three questions had been made.

1. Whether the Bishop be general visitor, so as to judge of elections, on the original foundation?

[*76] *2. Whether he be so on Dr. Keton's ingrafted, or annexed foundation?

3. If he be, whether the clause of distress, in Dr. Keton's indenture, excludes the jurisdiction of the Bishop?

1. The first question depends on c. 50, 51, of the statutes. General words are sufficient to make a general visitor; Dr. *Benley's* Case, Fitzg. 305(m), *Visitor sit Episcopus Eliensis*, adjudged to vest full visitatorial power in the Bishop and his successors. *K.* and Bishop of *Lincoln*, H. 2 G. 2. No set form of words is necessary to make a visitor(n), but the giving visitatorial powers is sufficient; the College, being founded on the scite of an old priory, did originally belong to the Bishop's jurisdiction as ordinary; and (unless it be afterwards exempted) must still continue so. Under Bishop *Fisher's* statutes the Bishop of Ely was appointed visitor; by Qu. Elizabeth's he is continued so, "*Visitationem Episcopo Eliensi commendamus*;" c. 50. And he is recognised as such in many other places in the statutes. The Queen reserved to the Crown all legislative power, but gave to the Bishop a full visitatorial authority. A visitatorial power must reside somewhere; and the uninterrupted exercise of it will presume a grant from the founder. Dr. *Martin* and Archbishop of *Canterbury*(o), Tr. 11 & 12 Geo. 2. B. R.; motion for a prohibition, for interfering as visitor of Merton College. Suggested, that the Bishop of Winton was their visitor; but it being shewn, that the Archbishop had continually exercised this right, the prohibition was denied; and *LEE, C. J.* cited 1 Vent. 155, and held, that though practice will not give a right, yet it is strong evidence to prove one; and the College have more than once acknowledged him their visitor. 4 Mod. 233, Skinn. 368, Comb. 279. If he be general visitor, the power of inspecting elections follows of course, as incidental to his office. *K.* and Warden of All Souls, Oxon., Sir T. Jones 175; *mandamus* to the warden to admit a fellow. He returned "A visitor;" and the Court held it incidental to visitatorial power, to admit and expell. And if to admit, then certainly to examine the right of admission. *The particular powers vested

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(m) 2 Stra. 912, 2 Bro. P. C. 220 (ed.

1803) S. C. See ante, 54 (h).

(n) *A. G. v. Talbot*, 3 Atk. 662, 1 Ves.

S. 78; *A. G. v. Middleton*, 2 Ves. 8. 328.

(o) Andr. 258.

in the Bishop will not exclude general incidental powers, *K. and Bishop of Chester*, Str. 797. Though cases may be put, where the visitor's power is suspended, yet that does not destroy it in other cases. *Green and Rutherford* in Canc. (p); a bill to compel the College to execute a trust. The College pleaded a visitor. The same doctrine laid down. If the visitor should (for instance) become master of the College, his visitatorial authority would be suspended in all points relative to himself, and that of the King's Bench would immediately take place (q). But in other points, and when he ceased to be master, the visitatorial authority would remain.

2. In *Pegge's Case*, A. D. 1726, the College on a similar foundation (*Dr. Berisford's*) has submitted to the Bishop's visitation. It is necessary, from the policy of colleges and schools of learning, that annexed foundations should follow the nature of the original. Otherwise, great confusion and perpetual disputes must ensue, when two jurisdictions clash; *Jennings's Case*, 5 Mod. 421. In *Mapletoft's Case*, alias *Attorney General and Talbot* (r), in Canc. 21 March, 1747, it was determined, that whenever a new foundation came into an old one, it must submit to the discipline of the original society, unless a special visitor be appointed. Allowed, that if the new founder gives new statutes or constitutions, such new policy may subsist; but there is no instance of this in either University. In the present case, half of the fellows of St. John's are ingrafted fellows; they all take the same oath, to observe the same statutes, which must mean the old statutes. Dr. Keton purchased the nomination of two fellowships and two scholarships for 400*l*. They are emanations from the old stock, and therefore visitable by the old visitor. Dr. Keton reserved to himself the power of making new statutes, which however must have been conformable to the old ones; but he made none: Therefore, upon all accounts, he left his fellows under the same rule and government, as the ancient foundation. The College is now governed by Queen Elizabeth's statutes. When these were made, Dr. Keton's foundation was incorporated with, and a part of the College. These statutes therefore relate to them, as well as to the old foundation.

*3. The clause of distress given to the church of Southwell, [*78] *nomine pœnæ*, cannot exclude the visitor. If they who are entitled to the penalty are to be looked upon as visitors *quoad hoc*, they are both judges and interested parties, which the law will not allow. Dr. Keton's fellows are entitled to all the rights of original fellows, whereof the right of appeal to the visitor is one. This remedy by distress is not given to the party injured, but to the church of Southwell; as an additional remedy, to prevent any collusion between the visitor and the College. Had it even been given to the party, still the visitor might have interfered to give specific relief, by compelling the College to

(p) 1 Ves. Sen. 462. (q) But see *R. v. Cath. Hall*, 4 T. R. 233 and *post*, 90, n. (A).

(r) 3 Atk. 662, 1 Ves. Sen. 78.

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admit; whereas the distress is of a different nature, only a satisfaction for the injury committed by excluding him, and that satisfaction very inadequate, only 13*l.* a-year. It is held, 2 Str. 1061, that the same person may be entitled to different remedies, and one does not exclude the other.

In support of the rule, Serjeant *Prime*, Mr. *Norton*, Mr. *Morton* and Mr. *Winn* argued, that the power of a visitor is extremely arbitrary, and therefore the right to exercise it should be narrowly inspected by the law. For, what is laid down in *James Bagg's Case*, 11 Rep. 99 b, "that an assize will lie to redress the sentence of a visitor," was ruled not to be law, in the Case of *Philips* and *Bury(s)*. All fundatorial rights arise from the property of the founder, and to see this property rightly administered, is the ground of visitatorial power. A founder has, *eo nomine*, a right to visit his own foundation; and if he dies without disposing of it, it descends to his heirs; or if he has no heirs, it escheats to the Crown. The College affects no independency; but says, the King is general visitor of the old foundation, in right of the royal foundress; and if no heir of Dr. Ketton appears, then of his foundation also, by right of escheat(*t*).

[*79] With regard to the three questions in this cause;—1. A founder may give general or particular powers to a visitor. If he gives only particular, and the visitor exceeds those * powers, such excess becomes a nullity, and the proper subject of a prohibition. Visitatorial power is not to be inferred from implication; it must be constituted by express appointment, 2 P. W. 325, Case of *Birmingham School*. The Bishop is in no part of the statutes appointed general visitor of the college, but a particular visitor only: therefore the general power still remains in the Crown. Particular visitatorial powers being given to the Bishop, will not make him general visitor; even though he is recognized in other parts of the statutes under the general name of *visitor*. An executor may be appointed with limited powers; and if such a one be spoken of as *executor* in another part of the will, that will not make him a general executor. In c. 50, the foundress reserves to herself the power "*interpretandi*, &c." from which power the Bishop is expressly excluded. In the clause which gives the strongest visitatorial power, "*Visitationem commendamus*," c. 50, the Bishop is also complimented with the nomination of one fellow: but the master and fellows are to judge of the idoneity of the fellow so named; which shews he is not universal arbiter and uncontrollable judge. In c. 45, powers are given to the Chancellor

(s) 1 Ld. Raym. 5, 2 T. R. 346.

(t) "The right of being visitor cannot be said to escheat; it is misapplying the word; for that appertains to estates held by tenure, and where, on failure of heirs of the donee, the estate reverts to the donor, as an escheat. There is nothing incongruous to say, that this power, which at the time when the charity was founded was vested

in somebody, should now devolve on the King, there being no other person, who has any claim to it, to be exercised *cy-pres* to the manner in which it was exercised by the founder and his heirs. This power, though not expressly reserved to the King, yet belongs to him by operation of law: "*per Ld. Kenyon in R. v. Cath. Hall*, 4 T. R. 243.

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of the University and others, quite inconsistent with the Bishop's claim, as general visitor. In c. 51, it is only directed, that if the master and five seniors, or seven without the master, think proper to call him in, "*ad collegium valeat accedere*," &c. If the Bishop be not general visitor, he has nothing to do with elections; for there is no special clause, to invest him with the right of inspecting them. The cases, 4 Mod. 233, *K. and Q. against St. John's College*, and Skinn. 368, *S. C.*; *K. and Gower (u)*, wherein the College recognized the Bishop as general visitor, in a return to a *mandamus*, will not bind the College: it was the return of counsel, not of the society; or if of the society, the successors shall not be bound by the mistake of their predecessors. The case of *Green and Rutherford* was never determined, but appeared to be an arbitrary proceeding on the side of the visitor. In *Dr. Bentley's Case*, there was no reservation of powers to the founder or his heirs, as in the present case; but the intention of the Crown was apparently to make an unlimited visitor.

*2. In *Pegge's Case*, 1726, the proceedings were had in the [*80] long vacation, when the Courts were not open to move for a prohibition. But however, the exercise of an illegal jurisdiction will never give a jurisdiction. If the Bishop be not visitor as to elections upon the old foundation, *a fortiori* he cannot be on *Dr. Keton's*. But supposing him visitor of the old foundation; yet he cannot be so of the new, except specially appointed by the founder; which is not here the case. *Qu. Elizabeth*, who was subsequent to *Dr. Keton*, could not make regulations for his fellowships; which were not of the foundation of the Countess of Richmond, under whom *Queen Elizabeth* claimed. *Dr. Keton* might subject his fellows to the then subsisting rules of government; but could not part with the right of visitation inherent in himself and his heirs, unless by plain and explicit words.

3. As to the clause of distress; there is a difference between superadding new fellowships to an old foundation, which is merely matter of donation, and thus purchasing two fellowships, which is a matter of contract; and therefore, *Dr. Keton* and his fellows are not to be deprived of their remedy at common law, for enforcing the execution of this contract. This remedy was not inadequate at the time it was made; 13*l. per annum* being a large sum in 22 H. 8, more than equal to the fellowships. But had it been inadequate, yet the founder thought fit to accept it, and require no more. This common law remedy is as effectual as any visitatorial power, and therefore would supersede it; for that is only founded upon necessity, because no better can be had. But here the party injured (as *Toddington*) may, upon shewing his right in a court of equity, compel the church of *Southwell* to distrain; which will bring the right to be determined on an issue at law: and being once determined for the candidate, the Court will grant a *mandamus* to

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admit him afterwards(*v*). But if the Bishop has a concurrent authority, he might judge one way, and the church of Southwell another; and so the jurisdictions would clash, and the College would be ground between them. *On the whole, if the Bishop's jurisdiction be even doubtful, the prohibition will be granted, or at least, leave to declare in prohibition, as was allowed in Fitzgibbon, 161, else the parties will be totally precluded of all remedy, and cannot appeal to any superior jurisdiction.

Afterwards, in the next Term, the Court delivered their opinion.

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30 GEO. 2.
1757.

Lord MANSFIELD, C. J.—It has been strongly insisted on, that the Court should at least give the College leave to declare in prohibition, that this matter might receive a more solemn determination: but I own I have strong objections to it, and will say a few things on that head, before I come to the merits of the case.

Leave to declare in prohibition only granted, when the Court inclines to prohibit; not when it inclines to the contrary.

Where the Court inclines to grant the motion for the prohibition, there the defendant has a sort of right to insist that the plaintiff shall declare in prohibition; but where the Court inclines against granting the motion, there the plaintiff has no such right to insist upon declaring(*a*). For, since by the stat. Winton the defendant is liable to costs, he cannot be compelled to defend the suit; wherefore, in such a case there may be judgment by default, and the Court may be obliged to prohibit, even against their own opinion. The defendant has his option, [*82] *and shall not be obliged to stand to an expense, which the thing contended for may by no means answer. And there can be no injury to the plaintiff, by discharging this rule; because all the King's Courts have an equal right to grant prohibitions. Who shall take upon them the burthen of defending such a suit? The promoter, or fellow aggrieved, who has only a temporary right? Or shall the visitor himself run through all the forms of law, even to a writ of error, only because the plaintiff desires it? If neither of them will do it, the consequence must be, that every College shall do as they please, even where the authority of their visitor is well founded.

I come now to the merits of the case, in which there are two general questions:—First, Whether the Bishop of Ely is by the statute general visitor of the College, with respect to the elections of fellows; for it is not disputed, that he is so in many other respects.—Secondly, Whether, supposing him so on the original foundation, he has the same jurisdiction over Dr. Ketton's, which are ingrafted fellowships.

1. Visitatorial power, however depreciated by the Counsel for the rule, is certainly very convenient for these learned bodies. It is a *forum domesticum*, calculated to determine *sine strepitu* all disputes that arise within themselves, and the exercise of it

Visitatorial power a very convenient establishment.

(*v*) But see *Dr. Widdrington's Case*, 1 Lev. 23; and *R. v. Aleop*, 2 Show. 170. *Gapper*, 3 East, 472; *Graham v. Potts*, post, 295.

(*a*) Bac. Abr. *Prohibition* (F); *Gare v.*

is in no instance more convenient, than in that of elections. If the learning, morals, or proprietary qualifications of students were determinable at common law, and subject to the same reviews as in legal actions, there would be the utmost confusion and uncertainty; while he who has the right, may possibly be kept out of the profits of what is in itself but a temporary subsistence. This power, therefore, being exercised properly and without parade, is of infinite use (b). But, whether convenient or not, we must take it, as it is established by law. A visitor, it is determined in *Philips* and *Bury*, is a summary judge, and a judge without appeal (c). Whatever objection *therefore is made, must be to the right itself, and not to his manner of exercising it. And having premised this, I will mention some other established rules concerning visitatorial power.

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No appeal from a visitor.

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The law considers these foundations in two lights; 1. As corporations; in which respect, they are the creatures of the Crown's charter, and governed by the law of the land: 2. As eleemosynary foundations; in which case they are the creatures of the founder's bounty, and subject to the power of visitation by the founder and his heirs, as was held in the Case of the *Charter-house*. But the founder may delegate this visitatorial power, either generally; or specially, by prescribing a mode for the exercise of any part of this power. But if a mode of visitation is prescribed in any particular case, that will not take away the general powers incidental to the office of a visitor; of which incidental powers, that of hearing complaints and doing justice thereon, was determined to be one, in the Case of *Philips* and *Bury*. No precise form of words is necessary to the appointment of a visitor: "Sit visitator" has been held a sufficient appointment. You must look into the whole tenor of the statutes, to see whether the power be given or intended to be given. When the statutes in question were made, visitatorial power was not so well understood as it has been since, and is at this day. A founder may appoint a particular visitor for a particular purpose. And he may split the power into as great a variety of statutes, for particular cases, as he pleases. But when he does that, the Court will collect from the whole considered together, whom he intended to appoint as general visitor. In the *Attorney-General* and *Talbot*, the Case of *Clare-hall*, Cambridge, in Canc. 21st March, 1747, Lord Chancellor argued thus, in order to determine, who was general visitor: One statute directed that the Chancellor of the University should visit "annuatim, si quid sit corrigendum:" A second gave him power to interpret the statutes: By a third, the Countess of Clare reserved to herself (but expressly *not* to her heirs) a power to alter the statutes. And from this review, though there were no general words *appointing the Chancellor general visitor; yet, as there were several references to him, and the heir was expressly excluded in one instance, the Court collected the intention of the foundress, and deter-

Visitatorial power may be delegated generally, or specially.

Appointment of a visitor may be collected from the general tenor of the statutes.

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(b) 4 T. R. 243, 2 Ves. Jun. 619, acc.

(c) Cowp. 322, S. P.

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Visitor's power
may be limited
by the founder.

mined that the Chancellor of the University was general visitor. The founder may also appoint a general visitor, and except some particular cases out of his general jurisdiction; or may chalk out another method of proceeding in others, without resorting to the visitor in the first instance (d).

Let us now consider the present case upon the local statutes, that is, upon the statutes of Queen Elizabeth. For, the old statutes of Bishop Fisher are no otherwise material, than as they may throw light upon the new ones, which refer to the old in their preamble: as the common law, or an old act of Parliament may throw light upon a new act, which alters the former in some respects, though the new one is the rule to resort to. Where a body of statutes is given by a founder, and a visitor appointed, I much doubt, whether the visitor can give new laws or injunctions, except the founder gives him an express authority; though I know there are cases wherein visitors (not being expressly prohibited) have exercised such a power. I mention this, because I observe a jealousy in the foundress here, lest the right of making statutes should be taken from her heirs, *i. e.* the Crown. The Bishop is therefore appointed visitor, not legislator; the legislative power is reserved to the Crown, the heir of the foundress, *c.* 50. In *Bentley's Case* (e) it was held, that when the founder had given a complete body of statutes, his heir (which in that case was the Crown) could not alter them, or give new ones without the consent of the College. But here is an express reservation of such a power. The particular powers granted to the Vice-Chancellor and three heads, in *c.* 45, and some other particular cases, seem only exceptions to the general visitatorial power. The question is, whether all the rest of the visitatorial power (not so excepted) is not vested in the Bishop of Ely. This depends principally on three statutes. **Cap.* 2 refers to the Bishop, as the known visitor of the College; and by words that would alone be sufficient to make him a visitor, if there be no other general visitor appointed. And if the general power be in the Vice-Chancellor, who is named in one single instance, or in the Crown, because it has the legislative power, this statute would be void. *Cap.* 50, gives express authority to the Bishop, to determine, interpret and explain the statutes. This is as large an authority as a visitor can have. A power to interpret implies a power to visit, and was held, in *Attorney-General and Talbot*, to constitute a visitor. The words at the end of this statute, "*visitationem commendamus*," are most strong and explicit words to make him a general visitor. *Cap.* 51, gives the Bishop a power to visit *ex officio*, "*cæteraque omnia facere et exercere, &c.*" And though he is to visit when called in, yet he is not restrained to that time only. As in *Talbot's Case*, the visitor was to visit *de anno in annum*, yet held a general visitor: In *Philips v. Bury, de quinquennio in quinquen-*

Power to interpret statutes constitutes a visitor.

Visitors may visit *mero motu*.

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(d) See *Ex parte Kirby Ravenscroft School*, 15 Ves. Jun. 305, 8 East, 221.

(e) In *Fitzg.* 313. See also 2 *Stra.*

912, *S. C.* and *post*, 550, 3 *Burr.* 1656, *S. P.* and 2 *T. R.* 310.

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It is incidental
to their office to
hear complaints.

nium, yet a general visitor. If therefore the Bishop be general visitor, he is so at all times. For if he is to visit, it is incidental to his office to hear complaints at any time. So held in *Philips v. Bury*, wherein Lord Holt cited from Roll. Abr. 513, the case of the Corporation of *Launceston*, where it was held to be incidental to a corporation to elect; and though they are directed to elect on a certain day, the power of election always belongs to them; which is a case directly apposite. I am the more confirmed in my opinion, by the case of *Green v. Rutherford*. This was an attempt of the visitor to compel the execution of a trust reposed in this College, to present [one of] their senior fellows to a particular living. In which it was argued, 1. That the Bishop of Ely was not the general visitor of this College. 2. If he was, that this was an ingraftment on the old foundation, in which the general visitor had no right to interfere. 3. That no visitor can interfere in relation to a trust at common law. The cause was made up, *but not till after [*86] *Hardwicke, C.*, had, assisted by the Master of the Rolls, delivered his opinion for the Bishop, on the first and second points: in the last of which, Sir *John Strange* agreed with him, though he gave no opinion upon the first. Lord *Hardwicke*, upon perusal of c. 2, 50, 51, was of opinion, that the Bishop was general visitor. His only doubt was upon that clause in c. 50, wherein the master is directed not to obey the Bishop of Ely, if he acted contrary to the statutes. But this he said was a special exception, and (whenever it happened) the jurisdiction would devolve to the King's Courts, as in the case of *Manchester College (f)*, the Bishop of Chester (being the appointed visitor) happened also to be warden: It was held he could not visit himself, but his right was suspended, and during this suspension devolved to the Crown. There is no light thrown in by the old statutes that tends to impeach this opinion, but they rather confirm it. What words in them might have raised a doubt, are left out in the new ones. *Cap. 50*, is in both: The words "Visitationem Episcopo Eliensi commendamus," are in both. So is also *Cap. 51*. But the words at the end of this statute, "Præter hunc visitationis modum" to "ubi non fundatores," are left out in the new. This seems to have been done purposely to avoid doubt. Though even as they stood in the old statute, they would not bear the construction which has been endeavoured to be put on them; as if the Bishop were confined to the special form there prescribed, or only to his jurisdiction as ordinary. The truth is, the Countess was jealous that the Bishop of Ely might claim to be founder; she was anxious lest he should give new statutes, or set up a right to change the old ones, and therefore she directs he should have no greater power than in other colleges, where he was clearly not the founder. It is to be observed, that to visit as ordinary, and to visit an eleemosynary foundation, are very different things; and yet the Bishops of Ely in Cambridge, and

If any special exception from the visitor's power, the jurisdiction devolves to the King's Courts.

(f). 1 Barnard. B. R. 52.

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of Lincoln in Oxford, had more visitorships because they were diocesans (g). It has been objected, that this is a proceeding to the deprivation of Craven, which cannot be done without the concurrence of the master and five seniors. But the fact is otherwise. This is not a proceeding to deprivation. It is a mere question of *right between Toddington and Craven to determine whether the latter is a legal member of the College or no; the decision of which has always been held incidental to the power of a visitor. Indeed, I believe it has never been seriously doubted in the College, whether the Bishop was the general visitor of the old foundation. Nothing has been suggested at the bar to shew it: And a case has been cited of *Pegge v. Burton*, where an appeal was made to the Bishop, and acquiesced in, concerning even an ingrafted fellowship. This brings me to the second question:—2. Whether Dr. Keton's ingrafted fellowships are subject to the review and sentence of the visitor of the old foundation? And this draws on a debate of the greatest consequence to all the Colleges in both Universities. One cannot see the tenth part of the mischiefs which would arise to the Colleges, if they should succeed in this point. There is no College which would not be involved in it. It would subject some of them totally to the King's Courts. In this very College of St. John's, the ingrafted fellows are in the proportion of seventeen out of thirty. I was desirous to know, whether the form of ingrafting fellowships before the reign of Queen Elizabeth, was not usually by indenture with a clause of distress, as this of Dr. Keton's is. I suspected it took its original from an analogy to tenure by divine service, which differed from frankalmoign, in that it was certain; and, if not performed, the donor or his heirs had, by common law, a right to distrain for it: whereas in frankalmoign, he had no remedy, but to complain to the ordinary; Litt. 136, 137. I have therefore inquired into most of the old foundations in both Universities, and find there are few without some ingraftments, and those generally made by indenture, as this is. And all ingrafted fellowships are upon the same footing as the old ones, except they are received upon particular terms, by a special form of foundation, and a special manner of acceptance.

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And (except the new founder has *ordained the contrary) the old visitor, *eo nomine*, visits all annexed foundations. In the case of *University College, Oxon.* in Canc. 26th July, 1740, William of Durham had ingrafted two fellowships under particular qualifications (King Alfred being the founder) without any particular directions about their visitor. On an appeal to the Crown, concerning the election of one of these fellows, the case was determined against the College; but there was no contest, nor so much as a doubt, concerning the right of visitation. The mode of donation is in all cases the law of it. If Dr. Keton had appointed another visitor, and the College had accepted his donation upon these terms, his visitor would take

place, but not otherwise. But he has directed his fellows to be fellows of St. John's College, though of his foundation; he contracts, that they shall have the same privileges and rights as other fellows, and they are to all intents on the same footing as the rest, save only their proprietary rights. They are to be elected as other fellows, there is no provision made as to the manner of voting for them; that is referred to the constitution of the College, and so also their age, learning, morals, &c. If the College judge wrong in these points, the visitor may review and reverse the sentence. Dr. Keton's fellows are moreover sworn to observe the statutes of the College, *i. e.* the statutes of the original foundation; for Dr. Keton made none himself, nor could he have made any, inconsistent with those of the foundress. Had he by his sole authority appointed a fresh visitor, that would have been inconsistent with the statutes of the original foundation. But he goes farther; and by disclaiming a power of making such inconsistent statutes, he shews his intention that his fellows should be under the same regulation and government, as the rest of the society. And the general visitor may proceed against either of them, as against the other fellows, even to expulsion. But even if there had been nothing more in the deed, than naming them fellows, they would, *eo nomine*, have become members of the corporate body, and subject to all the discipline and rules of the College. And this way of reasoning is not new. The *Attorney-General* and *Talbot* was the case of an ingrafted fellowship by one Freeman, by indenture, (but I don't recollect any clause of distress in it) and one question therein moved was, Whether the authority of a general visitor extended to ingraftments; but Lord Chancellor said, that the party was concluded by his own information; he has considered himself as a member of the College, and is, *eo nomine*, subject to the general visitor. In *Green v. Rutherford*, his Lordship held the same, and Sir *John Strange* concurred with him in opinion. As to the special remedy by distress, and proceeding in the King's Courts thereupon; this would have very extensive consequences, and affect many cases besides the present, as several benefactors have followed the steps of Dr. Keton, by inserting the same clause. The remedy is however inadequate in point of value, and it is not given to the party injured, but to Dr. Keton's heirs and the chapter of Southwell. This remedy, and that by appeal, are remedies *diverso intuitu*. The appeal is a specific remedy to be applied by the visitor of the College; the distress, as in tenure by divine service, is left to the common law. And there are many instances, besides these, where the remedy by distress does not take away the specific remedy. In prescribing proprietary qualifications, the founder has declared his will, and those who accept his benefaction are religiously bound to observe it; and are not to be allowed to say, they can judge better than their founder.

Upon these reasons, I am very clearly of opinion, that there is no ground for a prohibition in this case. If we were to grant

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New visitor can only be appointed at the time of the new ingraftment, by the College accepting the donation under that condition.

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Power of distress by a third person, is not inconsistent with the general visitatorial power.

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it on the second question made, it would create great perplexity in old societies, where perhaps it is now difficult to know the ingrafted from the original fellowships. If I had doubted, or inclined that a prohibition should go, I would have given leave to declare in prohibition; but as I have no doubt, I think, I ought not to consent to it, out of justice to the appellant (who may thereby be kept out of his *right for a long time) and also for the sake of the precedent.

DENISON and FOSTER, Js., concurred. WILMOT, J., absent in Chancery.

The rule was discharged (h).

(h) In all *lay* corporations, the founder, his heirs or assigns, are the visitors, whether the foundation be civil or eleemosynary; and, whatever might have been the opinion, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; 1 Bla. Comm. 480, 483; 3 Burr. 1656; that is, if the founder has not appointed a visitor; 1 Ld. Raym. 8; 2 T. R. 352, S. P.; and see *Eden v. Foster*, 2 P. Wms. 325. There are no particular words required in a donation to a college; it is sufficient if the intention of the founder appears, who shall be visitor, and technical words are not necessary: *e. g. Volumus, quod dictus cancellarius magistrum, &c. poterit visitare; et si quid inter eos repererit corrigendum, corrigat et puniat; Att. Gen. v. Talbot*, 3 Atk. 662, 1 Ves. Sen. 78; *Att. Gen. v. Middleton*, 2 Ves. Sen. 327; so a power clearly given to interpret the statutes; 15 Ves. Jun. 315.

But in the case of a private eleemosynary foundation, where no special visitor is appointed, and there is a failure of heirs of the founder, the right of visitation devolves upon the King (*ante*, 78, n. (t),) to be exercised by the Great Seal, and the Court of King's Bench will not interfere; *R. v. Catharine Hall*, 4 T. R. 233; which case was recognised and acted upon by Lord Thurlow, C. in *Ex parte Wrangham*, 2 Ves. Jun. 609. Application must be made to the Chancellor in his visitatorial capacity, by petition to the Great Seal; and not by bill or information; *Ibid.*; *Att. Gen. v. Earl of Clarendon*, 17 Ves. Jun. 491. And see particularly the case of *Queen's College, Cambridge*, 1 Jacob. 1. But where there is in point of substance a visitor, that excludes the general interference of the Court of Chancery, either by commission under the statute of charitable uses, 43 Eliz. c. 4, or its ordinary jurisdiction; *Att. Gen. v. Harrow School*, 2 Ves. Sen. 551; and see *Ex parte Kirby Ravensworth Hospital*, 15 Ves. Jun. 305, 8 East, 221; *Ex parte Berkhamstead School*, 2 Ves. & Bea. 134; *Att. Gen. v. Dixie*, 13 Ves. Jun. 519. Yet where there was a devise of a rectory to a college on trust (*inter alia*) to present the se-

nior divine, the Court of Chancery received a bill to compel the College to execute the trust. There Lord Hardwicke, C., says, "I agree in general, that if a subsequent donor gives the legal estate, or in trust for the College, without a declaration of a special trust, it will fall under the power of the general visitor to judge of the legal property in the one case, or the equitable in the other; because, by giving in trust for the College generally, and neither creating a distinct visitor nor a special trust, the donor has by plain implication intended it should fall under the general statutes and rules of the College, and be regulated with the rest of their property: although in the latter case indeed a bill must be in equity to compel the trustees, if they refuse: but in the present, the testator has declared a particular special trust, which must in some way be carried into execution and the will observed;" *Green v. Rutherford*, 1 Ves. Sen. 462, 473. But if there is a visitor, who can exercise jurisdiction, the appeal must be to him, and his judgment is final; *R. v. Grundon*, 1 Cowp. 315. This right of appeal however is confined to members of the College upon the foundation; it does not extend to independent members, as commoners, pensioners, &c. whose names are on the boards, who are to be considered as mere boarders, and expulsion as to them is a mere notice to quit, unless otherwise regulated by the private statutes of the College; *Ex parte Davison*, 1d. 319; 2 T. R. 333; *R. v. St. John's, Oxon.* Comb. 238, S. P. So the Twelve Judges being visitors of the Inns of Court, a *mandamus* will not lie to those societies, with regard to the admission of barristers; *R. v. Benchers of Gray's Inn*, 1 Doug. 353; and a bill relating to the purchase of chambers was dismissed in Chancery; *Cunningham v. Wegg*, 2 Bro. C. C. 241. So the Court of K. B. will not control their discretion in refusing to admit an individual a member of their society; *R. v. Lincoln's Inn*, 4 B. & C. 855. Yet if a visitor refuse to receive or hear an appeal, the Court of K. B. will compel him by *mandamus*; *R. v. Bishop of Lincoln*, 2 T. R. 338, n. (a); *R. v. Bishop of Ely*, 5 T. R. 475; and where a *mandamus* had been granted to

the master of a college, the Court would not supersede the writ on affidavits of there being a visitor, but put the Master to make a return of that fact; *R. v. Whaley*, 2 Stra. 1139. And see *post*, 547.

The Bishop of Ely is general visitor of Peterhouse, in Cambridge, by the statutes of which College the fellows are required, on a vacancy of the Mastership, to elect two fit persons to be presented to the Bishop, or, *vacante sede*, to the *custos spiritualium*, one of whom the Bishop or *custos* is to nominate as Master. The Court of K. B. granted a *mandamus* to the Bishop to nominate one of two persons so presented, he having previously nominated a third person not so presented: and they considered, that *quoad hoc* he was not to be considered as visitor, inasmuch as the same power is given to the *custos spiritualium vacante sede*, and it is clear he is not a visitor. Another ground of their decision was, that in this case, he had not acted in the character of visitor, inasmuch as he had determined in nominating the third person without having heard the parties concerned: the exercise of the visitatorial power being a judicial office (*Id.* 349, S. P.). They also determined, that, this being an application to the discretion of the Court, they had a right to inquire, whether the College had put a right interpretation on the statutes of the College;

R. v. Bishop of Ely, 2 T. R. 290, 334. The judgment of the visitor is final (1 Cowp. 322), and his acts, whether right or wrong, are not to be examined in courts of law, that is, in cases where he has acted within his jurisdiction, upon the principle that he is the judge, whom the founder has thought proper to appoint; 2 T. R. 336. No court of law or equity can anticipate his judgment; or take away his jurisdiction; but his determinations are final and conclusive; 3 Atk. 674; 5 T. R. 477, S. P. And there is no appeal from his decision, if the founder has not thought fit to direct one; 2 T. R. 353. But this power of the visitor is confined to acts within his jurisdiction, and it seems an action would lie against him, if he were to exceed it; 1 Ves. S. 470. A visitor need not hear parol evidence; it is sufficient if he receive the grounds of appeal and the answer thereto in writing; *R. v. Bishop of Ely*, 5 T. R. 475. Neither can he compel a specific performance; *R. v. Dr. Windham*, 1 Cowp. 377; nor hear evidence on oath; in *R. v. Benchers of Gray's Inn*, 1 Doug. 356. In the exercise of the visitatorial jurisdiction, the Lord Chancellor is not bound by any exact forms of proceeding; *Queen's Coll. Camb.* 1 Jacob, 19. See farther as to the nature and properties of a visitor, *C. J. Holt's* judgment, 2 T. R. 346.

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MICH. TERM,—31 GEO. II. 1757.—IN CHANCERY.

Case of CHRIST'S COLLEGE, Cambridge.

S. C. Amb. 351, 1 Eden, 10.

MR. TANCRED by deed, 22d January 1721, conveyed his estate to feoffees, to the use of himself for life, remainder to his first and other sons in tail, remainder to certain officers of Christ's College, to maintain certain students there, in the sciences of physic and divinity, and four students of the law, at Lincoln's Inn; and also certain pensioners, *viz.* decayed merchants, soldiers and clergymen, who should reside in his capital house at Wicksley. By his will, 20th May, 1746, duly executed, he confirms this deed, but fearing the statute of mortmain, 9 Geo. 2(a), might defeat the uses thereof, he orders, that in case the said uses or any of them should be contrary to law, the estates so settled should go to the fellows and scholars of Christ's and Caius College, to be divided in certain proportions, for augmentation of their stipends.

On an information by the *Attorney-General*, to establish this

Benefactions to the Universities, how far within the statutes of mortmain.

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charity, at the relation of Christ's College, against the heir *at law; there arose two questions; 1. Whether this was a conveyance to charitable uses, under the statute of Elizabeth (b), and therefore to be aided by this Court; 2. Whether it fell within the purview of the statute of mortmain, 9 Geo. 2, and was therefore a void disposition.

Court of Chan-
cery will aid de-
fective convey-
ance to legal
charitable uses.

Per HENLEY, Keeper.—The conveyance of 22d June, 1721, is admitted to be defective (c), the use being limited to certain officers of the corporation, and not to the corporate body; and therefore there is a want of persons to take in perpetual succession. The only doubt is, whether the Court should supply this defect, for the benefit of the charity under the statute of Elizabeth. And I take the uniform rule of this Court, before, at, and after the statute of Elizabeth to have been, that where the uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such uses. Thus though devises to corporations were void under statute Hen. 8(d), yet they were always considered as good in equity, if given to charitable uses. There is here no doubt of Mr. Tancred's power to convey; and the uses are truly charitable and very proper in themselves, the education of poor scholars in the University, students at the Inns of Court, and poor pensioners in his own house. Therefore, however unbecomingly Mr. Tancred has expressed himself in his will, with respect to his relations (and indeed he seems to have cast off all natural affection), and however reluctant I may be to establish a disposition made under this turn of mind; yet sitting here judicially, I am obliged, by the uniform course of precedents, to assist this conveyance; and more especially, because it is the peculiar province of a court of equity, to protect men in the freedom of disposing of their property, which is a point of the utmost importance in a trading country. This conveyance therefore being established under the statute of Elizabeth (e), we are next to consider how it is affected by statute 9 Geo. 2. Mr. Tancred, by his will, makes a disposition, by way of substitution: in case the dispositions are within the statutes of mortmain,—“Then to the fellows, &c. of the two colleges.” The relators admit that part of the disposition is void with regard to the pensioners and law students; *but then they contend, that the substitution must take place, by reason of the exception of the universities and their colleges in the statute. The defendants contend, that all is void, as well the substitution as the original uses; because the devise is not to the body corporate, but only to the particular fellows in their personal capacity. No cases have been cited on either side. We must therefore form an original construction of this clause in the statute of mortmain. And my opinion is, 1. That this is a de-

(b) 43 Eliz. c. 4. See Bac. Abr. *Charitable Uses* (C).

(c) 4 Vin. Abr. *Charitable Uses* (B).

(d) 34 & 35 H. 8, c. 5.

(e) But against the express words of the

stat. s. 2; most clearly so, that it be (according to the first point in the next page) a devise for the benefit of the whole body corporate. *MS. Serj. HILL.*

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visé for the benefit of the whole body corporate; 2. Had it not been so, I should still have thought that the Legislature intended, by the exception in the statute, to save a devise for the benefit of particular members, as well as of the whole body. The Legislature meant to except such devises(*f*) as were really and *bona fide* for the benefit of colleges: not those, in which the legal interest only passes to the college, in trust for other charitable uses; for then the statutes of mortmain might be defeated every day. And this devise is for the benefit of the whole society; even of the master himself, who must pass through a fellowship, and partake of Mr. Tancred's bounty in his progress towards the headship. Besides, we all know that in these houses of education, any encouragement for youth to enter into a particular college is a general benefit and profit to the whole society. The Legislature has thrown no restraint on these gifts, when made to the body corporate of either university, or to colleges already established there; intending not to increase the number of foundations, but to have those better endowed, which are already established. They judged that leaving this path open would not, for some time, be liable to much inconvenience. But when they saw an inconvenience, they restrained even gifts to colleges. Livings are grantable to these bodies, only till they amount in number to a moiety of the fellows(*g*); lest, if the succession be rendered too rapid, there should not be persons left, of sufficient age, temper, and discretion, to govern the society, and answer the great purposes of the foundation. This devise to the fellows and scholars contains no circumstances that intimate any intent to give them the estate in their *personal capacities. It is clearly to them, as members of the body corporate, for a perpetual augmentation of the revenue of themselves and successors. Therefore I shall decree the disposition to the pensioners and law students void, under the statute of mortmain(*h*); but shall establish the exhibitions to the students in divinity and physic, and shall direct the substitution to take place, for the benefit of the fellows and scholars of Christ's and Caius Colleges, in their corporate, not natural, capacity(*i*).

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Devise for the benefit of particular fellows good within 9 Geo. 2. Devise to colleges, as trustees for other charitable uses, void.

Exception of stat. 9 Geo. 2, extends only to colleges already established. (A. D. 1736.)

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(*f*) The word "devise" is not particularly mentioned in the proviso here alluded to, which is, that this act shall not extend to make void the disposition of any lands, &c.: so that there seems no just ground for saying, that the act makes good any dispositions, whether by devise or otherwise, that were not good before the act, but leaves all dispositions as they stood before the act; that is, that such as before the act were valid, should, notwithstanding the act, continue to be so; and those which before the act were not good, are not made good by the act. *MS. Serj. HILL.* And see 3 Ves. Jun. 728, *A. G. v. Bowyer*.

(*g*) But s. 5, of 9 G. 2, c. 36, restrict-

ing the number of advowsons, is now repealed by 45 G. 3, c. 101.

(*h*) The words of this part of the decree are these, *viz.* "that the devise of the additional lands and hereditaments for the benefit of twelve pensioners and four law students, is void by the statute of "Mortmain." *MS. Serj. HILL.*

(*i*) See 43 Eliz. c. 4; *Flood's Case*, Hob. 136; *Att.-Gen. v. Green*, 2 Bro. C. C. 492; *R. v. Newman*, 1 Lev. 284; *Att.-Gen. v. Whoreswood*, 1 Ves. S. 534; *Att.-Gen. v. Munby*, 1 Mer. 327; 7 & 8 W. & M. c. 37; 1 Bac. Abr. *Charitable Uses*; and *Bennett Coll. v. Bishop of London*, post, 1182.

IN THE KING'S BENCH.

THE KING *v.* WILLIAMS.

S. C. 1 Burr. 402; 2 Lord Kenyon, 68.

Costs not given on information *quo warranto*, unless on usurpation of offices or freedoms in corporations. But there is judgment of ouster, though the usurpation is not continued to the trial.

ERROR (*k*), from the great session in Wales. Defendant was found guilty, on an information in the nature of *quo warranto*, for unlawfully holding a court in the corporation of Denbigh; and judgment was entered against him, *quod capiat*, and he ousted from holding the same for the future, and that he should pay costs according to the statute: on the latter branch of which judgment, the writ of error was principally brought.

Mr. *Madocks*, for the plaintiff in error, argued, that by stat. (9 Anne, c. 20,) costs are only given upon usurpations of an office in a corporation, or the franchise of being a freeman; that here is no usurpation, unless by implication and inference, *viz.* that holding this court was an usurpation of the office of bailiff, before whom the court ought to be held; but that informations must not rest upon implications; Hawk. P. C. 2. 261; Salk. 375; Ld. Raym. 527, Doing one act is no usurpation of the office, except it had been stated to be done by way of claiming the right of that office. By the charter, an alderman may hold the court, as well as the bailiff; therefore this information cannot try the right to either of those offices, exclusive of the other; neither is there any direct charge of usurpation, but only of what is evidence of an usurpation. Neither ought there to be any judgment of ouster. There is no charge of usurpation at the time of the information, but *only of a fact that is past, a mere misdemeanour, for which the defendant is fineable. *Quo warranto's* were formerly returnable only in the King's Bench; but an ill use was made of the writ, by extorting money from the defendants, who prevailed on the trial, for a writ *de libertatibus allocandis*. K. Edw. 1, anno regni 18, ordained, that *quo warranto's* should be returnable before justices in eyre, and took away the writ *de libertatibus allocandis*. These writs of *quo warranto* were of an inquisitorial nature, and therefore *Non usurpavit* was no plea to them: Godb. 91; 3 Leon. 184; Lucas, 211, 212, 299; for the demand of the writ was to shew, *why* he did usurp, or else that he should disclaim any warrant at all. On the discontinuance of justices *itinerant*, temp. E. 3, the Court of King's Bench revived its jurisdiction in the present shape. For being *Custos Morum* of the nation, and the usurpation being a crime, the Court grafted the inquiry of *quo warranto* upon this its criminal jurisdiction. Hence it should seem, that for a crime or fact of usurpation past, there

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(*k*) The information was, for claiming to hold a court; the writ of error set forth the information to be for claiming to be a bailiff of a borough; the Court gave leave

to amend the writ agreeable to the record, upon stat. 5 G. 1, c. 13, s. 1; S. C. 1 Ld. Ken. 470.

can be no judgment of ouster, but only for a present usurpation. The inquiry of *quo warranto* is only to hear what defence can be made for the preceding crime.

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Mr. *Hall*, for defendant in error, argued, that informations, in nature of *quo warranto*, relate chiefly to civil rights (*l*), and are so considered by stat. 9 Anne. Facts of usurpation amount to the same, as if the word *usurped* had been used; for there are no technical words necessary in informations, as upon some indictments. If this be not an usurpation of an office, it is at least an intrusion into a borough franchise, and that is sufficient. For the title of stat. 9 Anne extends to *offices and franchises* generally. This statute is a remedial law, and therefore to be construed favourably, Cro. El. 257. The Court has often put a liberal construction on costs. Stat. 7 Jac. 1, extends to *under-sheriffs* and *deputy-constables*, though not mentioned in the statute. Courts have extended indictments by indictment: so Sid. 91; Cro. Jac. 473; Sir T. Raym. 34, 35. With respect to the judgment of ouster, we can only say, that the rule of the Court is to enter up judgment of ouster, whether the usurpation be continued till the trial or no.

* *Per* MANSFIELD, C. J., *et tot' Cur.* All corporations consist of officers and freemen. This stat. 9 Ann. was meant to extend to both; and to give a remedy which could not be had at common law in these disputes, which are really between party and party, and which frequently settle the rights of voting for members of Parliament. The body of the statute is very clear, and only extends to offices and franchises of being burgesses or freemen. The conciseness of the title shall not control the body of the act. The title is no part of the law; it does not pass with the same solemnity as the law itself. One reading is often sufficient for it (*x*). As for construing the statute by equity; equity is synonymous to the meaning of the legislator, and it does not appear, that the Parliament meant to give costs in the present case. There is no charge of usurpation, even by implication or inference. Holding a court is no necessary argument, that he intended to usurp the right. He might hold it by deputation, or by mistake. Costs are only given, where two persons are trying a civil right; this is a mere *misdemesnor*. The statute judgment of costs is therefore wrong (*m*). As to

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Title of a statute
no part of the
law.

(*l*) And therefore a new trial may be granted; *R. v. Francis*, 2 T. R. 484.

(*x*) See *A. G. v. Ld. Weymouth*, Amb. 22, *per* Ld. Hardwicke, C.

(*m*) This case governed a similar decision of the Court in *R. v. Wallis*, 5 T. R. 375; *S. P. R. v. Richardson*, 9 East, 469; *R. v. Hall*, 1 B. & C. 237, 2 D. & R. 341. The prosecutor of an information in the nature of a *quo warranto* shall pay costs, generally, for not proceeding to trial pursuant to notice, being within the equity of 9 An.; *R. v. Powell*, 1 Stra. 33; *Anon.* Say. R. 130. If any one of several issues on a *quo warranto* information be found for the prosecutor, upon which judgment of ouster is given, he

is entitled to costs on all the issues; *R. v. Downes*, 1 T. R. 453. Before the exhibiting of such an information, the relator should enter into a recognizance in £20 to prosecute the same with effect, under 4 & 5 W. & M., c. 18, s. 3; *R. v. Mayor, &c. of Hertford*, 1 Salk. 376; Carth. 503. And if he do not proceed to trial within a year after issue joined, he shall pay costs to the amount of the recognizance; *R. v. Morgan*, 2 Stra. 1042; *R. v. Howell*, Ca. temp. Hard. 247. But the Court will not stay proceedings, until the prosecutor give security for costs, on the ground that the relator (*being a corporation*) is insolvent; *R. v. Wynne*, 2 M. & S. 346.

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the common law judgment of ouster; it is nothing to the purpose, whether the defendant claims, or does not claim the right. The only question is, whether he has done the thing which implies a claim. In that case, judgment of ouster must be given, lest he should repeat the act⁽ⁿ⁾. Therefore reverse the judgment, for costs, and affirm the rest.

N. B. *Per* FOSTER, J.; the stat. 9 Ann. c. 20, was drawn by Justice POWELL.

(n) See *R. v. Mayor of Penryn*, 1 Stra. 582, 8 Mod. 234, S. C., there called *R. v. Pindar*; *R. v. Hearle*, 1 Stra. 627, 3 Bro. P. C. 505, (2d ed.); *R. v. Clarke*, 2 East, 75. See also *R. v. Amery*, 2 T. R. 515, where the subject of *quo warranto*'s is fully discussed; Com. Dig. *quo warranto* (C. 5).

See also 32 G. 3, c. 58; and as to its construction, *R. v. Richardson*, 9 East, 469; *R. v. Stokes*, 2 M. & S. 71; *post*, 470, n.; and further as to *quo warranto*'s, *R. v. Bridge*, *ante*, 46; *R. v. Carmarthen*, *post*, 187; *R. v. Marsden*, *post*, 579.

WYNDHAM v. CHETWYND.

S. C. 1 Burr. 414; 2 Ld. Ken. 121.

Creditors, where debts are charged by will on the real estate, the personal being sufficient to pay them, and
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being actually paid, were good witnesses to that will even before the stat. 25 G. 2. cap. 6.

ISSUE out of Chancery, "*devisavit vel non*," to try the validity of a will of one Mr. Chetwynd deceased. The jury found a special verdict, with regard to the attestation of this will, stating, "That the testator died 17th May, 1750 (o), leaving the will in question behind him, which was regularly attested by Higden, Squire and Baxter: that testator was indebted about 18,000*l.* upon mortgage of his real estate, and left behind him a personal estate of 13,972*l.* which was vastly superior to all his specialty and simple contract debts: That he charged his real estate with the payment of his debts and legacies: That at the time of attesting this will, he was indebted to Higden the witness, who was an apothecary, about 11*l.* and at the time of his death, about 18*l.* 10*s.* which was paid off by the executor, before the trial of this issue; and that he was indebted to Squire and Baxter the other witnesses, who were two attorneys in partnership, about 280*l.* at the time of attestation; which also (except a small mistake by miscasting) was out-set or discharged, before the day of trial. And if these were credible witnesses within the statute of frauds, they found for the plaintiff, which established the will; otherwise, for the defendant."

Serjeant *Prime* for the plaintiff argued, *First*, That the facts, as stated, did not make these witnesses, interested witnesses. They are no legatees, and derive nothing from the gift or bounty of the testator. They were justly entitled to payment of their debts, though no will had ever been made. The per-

(o) The testator, it appears, died May 17th, 1750, 23 G. 2; and therefore before the stat. 25 G. 2, c. 6, by s. 2, of which it is enacted, "That in case, by any will or codicil already made, or hereafter to be made, any lands, &c. be charged with any debts, any creditor, whose debt is so charged, attesting the execution, shall be admitted as a witness to the execution." S. 8 provides, "that the act shall not ex-

tend to any heir or devisee, who has been in quiet possession two years previous to May 6th, 1751, nor to any will or codicil, the validity of which has been contested in any suit commenced on or before May 6th, 1761, whether the same be determined or be still depending." This case having probably been commenced in Chancery before that period, comes within that proviso.

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sonal assets were the proper fund for them to resort to, and that is sufficient to pay their demands; so that they are not interested in the charge on the real estate. *Secondly*, That supposing them to *have been* interested witnesses; yet that interest was removed, before the time of trial, their debts being then discharged. The word, "credible," is an ambiguous expression, and capable of many senses. But there seems to be a parliamentary exposition of it in statute 4 & 5 Ann. c. 15. § 14, whereby, three witnesses are required to authenticate a nuncupative will, and it is declared, that such as are good witnesses at common law in trials, shall be deemed good witnesses, to establish a nuncupative will. Now, allowing the same exposition to take place on the statute of frauds; then, as these witnesses would be unexceptionable on a trial at law, in respect of interest, so they are competent, and therefore credible witnesses, to the present devise.

* There were also cited in this and the former argument, [* 97]
 Plowd. 541; 1 Inst. 212b; Hardr. 331; 1 Mod. 107; 1 Sid. 315; 2 Keb. 128; Ld. Raym. 730; Viner, Evid. 14, No. 53.

Mr. *Norton* for the defendant argued, that at the time of attestation, the witnesses were interested, and therefore incompetent; and that this, not the time of examination, is the proper season of inspecting their credibility; else it would open greater opportunities of perjury and fraud, than before the act. It would be setting up witnesses to hire, and would put the validity of the will in the power of the witness, by releasing or not releasing their interest. If a witness is unexceptionable at the time of attestation, and afterwards becomes infamous or insane, the will is nevertheless a good one; which proves that his condition, at the time of attestation, is alone to be regarded.

To this purpose were cited 2 Ld. Raym. 1008; Hob. 92; Salk. 283; 1 Mod. 21; Skinn. 144; 1 Inst. 6 b; and it was observed that the Serjeant's cases were most of them prior to the statute of frauds.

He insisted also that *credible* means something more than *competent*; the law required competency before; and it is not to be imagined, that the learned compiler of this statute, Lord Hale, would put in a word, which at best was superfluous. In stat. 13 Car. 2(p), against deer-stealing, and in all the game laws, the expression of "credible witness" is used, which has always been understood, to mean competent and somewhat more, and to give the justices a discretion, whether they will convict upon such testimony or no, though the witness was in law strictly admissible. There are two cases directly in point for the defendant, on which we must strongly rely, *Hilliard* and *Jenyns*, 1 Ld. Raym. 505, and *Asty and Dowsen*, 19 Geo. 2. (see page 8.)

On the argument, Lord MANSFIELD, C. J., expressed his doubts of that generally received opinion, that Lord Hale drew the statute of frauds, 29 Car. 2: he having died in 1676, 28

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 draw the statute
 of frauds.

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Reason of the
definition of
good witness in
stat. 4 & 5 Ann.
c. 15. s. 14.

Car. 2; and he observed also, that the statute 4 & 5 Ann. * was enacted, to check the extravagant notion of some civilians, by which they excluded from being witnesses, the children and family of the testator, as well as of the legatee; arising from a strange fiction in the Roman law, in which testaments were transacted in the form of a sale, between the deviser and devisee, to which none of either's family were allowed to be witnesses.

Afterwards in the same Term, Lord MANSFIELD, C. J., delivered the opinion of the Court.

In this case, the real estate is only charged with the payment of debts, as an auxiliary fund to the personalty, which stands in need of no assistance, being itself much greater than the debts: And at the time of trial, the three witnesses were not creditors to either the real or personal estate, but were so, at the time of attestation. And hereon, the question is, whether this be a valid attestation, within the statute of frauds. This is a doubt which sprung out of a general question, in *Ansty* and *Dousen*, whether a benefit to a witness, arising from a will, shall annul his testimony; though after, or at the testator's death, he becomes totally disinterested. The solution of this question depends upon general principles, and not upon the words of the statute. The statute declares no incapacity, lays down no legal conditions for admitting witnesses. The word *credible* is no term of art; it has only one signification, and that universally received; it is never used as synonymous to legal competency. It presupposes evidence to have been already given, whereas competency is a consideration previous to the admission of evidence; and in the statutes mentioned at the bar, the expression so frequently used, of *credible witnesses*, is never construed to mean *competent*. To make the validity of a will depend upon the credibility of the witnesses, would be absurd; since the testator can never foresee, what credit may hereafter be given them.—It is true, that in *Butler and Baker's Case*, 3 Co. Rep. 25, the third caution there given is, "call *credible* witnesses," but that is only a loose and casual expression, though perhaps the penner of this statute might take his hint from thence. I can never conceive, for the reasons I formerly

[*99] * mentioned, that this statute was drawn by Lord Hale; any farther than by perhaps leaving some loose notes behind him, which were afterwards unskilfully digested (g). I therefore think the epithet *credible*, in this statute, is used as a word of course, but is unfortunately misapplied.—If it signifies competent, that is implied in the word *witness* alone; if it means any thing more than competent, it is (as before observed) absurd. There have perpetual doubts arisen upon every clause of this statute, not only among the unlearned, for whom it ought to have been calculated, but even among the learned also. In so inaccurate a statute, I therefore think the word *credible* might

Witness to devise subject to the same rules (and no other) as witnesses to other conveyances.

(g) Lord Ellenborough, however, favours the opinion, that it was drawn by Lord Hale; 5 East, 17.

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accidentally slip in, and ought not to be attended to, as if it carried any special legal meaning. I shall therefore consider this statute as only requiring the attestation of three subscribing witnesses, *i. e.* legal competent witnesses; and I cannot but observe, that the necessity of having *subscribing* witnesses to any instrument never existed before in this country. The statute determines no point of time for the competence of witnesses; and as I think that competence is not confined to the time of attestation, so I think, that the incompetence of witnesses at the time of their examination, could never be intended for a question by the Legislature; since, however competent at the time of attestation, they may become insane or infamous, before the time of examination. This competence of witnesses to wills must therefore depend upon the general rules of competence for all other witnesses. I will therefore consider,—

1. How this matter of competent attestation would have stood upon general principles, supposing no judicial determinations had been given.—
2. How the authority of judicial determinations stands; for if there are any in point, they are certainly proper to be adhered to.—
3. How these two rules may be applied to the present case.

1. As to general principles, the power of devising ought to be favoured; it naturally follows the right of property. It ^{*}subsisted in this kingdom before the Conquest, [* 100] and till about the reign of Hen. 2, when it ceased by consequence of feodal tenure, not from any express prohibition. The doctrine of uses revived this power, and the statute of uses accidentally checked it. This occasioned the statute of wills to be soon afterwards made; which received a great enlargement, by the altering of tenures in the reign of Car. 2. And this testamentary power over property is more reasonable in this kingdom, than it was even among the Greeks and Romans; since by reason of primogeniture and other exclusive rules of descent, the succession *ab intestato* among us, is not so equal and universal, as among those people. The statute 29 Car. 2, was not meant to check this power, but only to guard against fraud. In theory, it seemed a strong guard; in practice, it may be some guard. But I believe more fair wills have been destroyed, for want of observing it's restrictions, than fraudulent wills obstructed by it's caution. In all my experience at the Court of Delegates, I never knew a fraudulent will, but what was legally attested; and I have heard the same from many learned civilians. Courts of justice ought therefore to lean rather against, than in support of any too rigid formalities. And upon this principle, before the statute, it was held in 1658, 2 Sid. 109, that parishioners might be witnesses to a devise, though it was for the benefit of their own poor. Interest in a witness is certainly an objection to his competency. This arises from a presumption of *bias*. It is no *positive* disability, as if a particular age, &c. were required, and wanting, in a witness. It is only presumptive, and presumptions only stand, till the contrary is made apparent. There is no presumption of bias in a witness, who at the time of signing

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probably knew not the contents of the testator's will, and after his death, is discharged from, or has renounced, all interest arising from thence. Nothing can be more reasonable, than to allow this objection of interest to be purged, by matter subsequent to the attestation, and previous to the trial; if it were only for the benefit of third persons. Shall tokens of kindness to friends, servants, &c. who may be unwarily called in as witnesses, vitiate a so^{*}lemn and well weighed disposition of a man's whole estate, when by payment or release, their interest may at once be removed? This would be unreasonable; and the more so, since there are methods, by which the legatees may, by circuitry, be witnesses to a devise, in their own favour. If the land be once charged with legacies, by a well attested will, legacies may be given, by a subsequent unattested codicil, to the witnesses of that very will. 2. As to judicial authorities, in all cases of testimony, it has been often determined, that a release takes off all objection in point of interest; and therefore, I give credit to the *dictum* of Judge *Powys* in *Viner* (r), not on the authority of the Reporter, but because it is consonant to the known practice of Westminster Hall, in other cases. *Hilliard* against *Jenyns* (of which *Carthew's* is the best report(s), he being counsel in the cause) is in substance much the same as that of *Ansty* against *Dowson*. In this last case, the wife of one of the witnesses had an annuity, charged on the lands devised. No release was had; no payment, no tender could be made. And as husband and wife are considered as one person, this was a material objection to his testimony. And it was on the particular circumstances of this case, and not upon any general doctrine, that the judgment in the King's Bench was founded, as *Denison, J.*, soon after assured me. It is true, that *Lee, C. J.*, in delivering his opinion went into the general point, and argued, as if the credit of a witness could not be purged or varied, by any act subsequent to the attestation; which he grounded on a maxim of the Roman law, "*Conditionem testium inspicere debemus, eo tempore cum signarent.*" But this was not sufficiently considered; as will appear from a short view of the Roman testaments. These originally could not be made, but in *procinctu*, or, as a legislative act, *in comitiis calatis*. But after the law of the Twelve Tables, which gave the power of private testaments, testamentary matters were usually transacted *per æs et libram*, under the fiction, and in the form of a sale or contract, between the testator and the legatees. These symbols were used before the introduction of written instruments, and to this symbolical sale, five, and afterwards to the written instruments, * seven witnesses were required; who must be citizens, freemen, adults, and attended with other qualifications. This positive capacity was the *condition* of the witnesses, referred to in the Roman law; which was requisite to be in them, *at the time* of their attestation or signing, and not *afterwards* only; in like manner,

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(r) Vin. Evid. (F.) pl. 53.

(s) Carth. 514, Com. 91, S. C.

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as when a surrender must be made into the hands of two copyhold tenants, it will not be good, if made into the hands of a stranger, though he should afterwards become a copyholder. The *interest* of the witnesses was not in the contemplation of the law; for heirs were admitted as subscribing witnesses, after the symbolical sale had ceased, as appears from *Cic. pro Milon. Und fui, testamentum simul obsignavi, &c.* And Inst. 2, 10, 10. And it appears also from sect. 11, that *cestuy que trusts* and legatees were allowed to be subscribing witnesses. The consequence of this doctrine of *Lee, C. J.*, was, that no creditors or legatees (if the estate was charged to pay them) could at any rate be good witnesses. And yet, when Lord Aylesbury died, 10th February, 1746, leaving a will witnessed by three servants, to all of whom he had left annuities, &c. charged on lands, which they released before examination; and it appearing, that by a former will, dated 1744, and witnessed by other persons, he had left the same annuities: Lord Chancellor, in 1748, held them to be good witnesses to the second will; for, 1st, it was indifferent to them, which will should stand good; and, 2dly, they had released. And in *Baugh and Holloway*, 1 P. W. 557, Ld. Raym. lays down the same general doctrine, which I would now establish; and also another point, which agrees with my opinion, that an interested witness may prove a devise to another, though not to himself. In all judicial determinations, devises have been considered not in the nature of wills by the Roman law, but as dispositions and conveyances of real estates; whence it is, that by such disposition of all one's lands, estates that are purchased subsequent thereto, will not pass. Therefore, the interest of the witness to devises, should be governed by the same rules, as in all other written dispositions of real estates. * As to the notion, started in the argument of *Ansty* and *Dowson*, of four devisee-witnesses dividing an estate among themselves, by reciprocally attesting for each other; this might as well be effected by four distinct devises, separately attested by three of them, in rotation. But in either case, the very contrivance would appear so fraudulent, as alone to be sufficient to set it aside. 3. With respect to the present case; my opinion is, that a charge of debts upon the real estate ought not to incapacitate witnesses, who are creditors, from proving a testament. This clause ought to be in every conscientious will, and the man who omits it has been very justly said, to sin in his grave. This would be my opinion, even if the witness sought or wanted a benefit under such a will. But in this case there is no occasion to resort to the real estate; the personal is more than sufficient to pay the debt of the witnesses, and they have been already paid: Therefore, we are all of opinion that the will is duly attested by three witnesses. This is the judgment of the Court. Whatever mistakes may have been committed in the course of this argument, are imputable to myself alone (t).

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(t) The question as to who is to be deemed a *credible* witness within the statute of frauds; and at what time he is to be so regarded, is now nearly set at rest,

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by 25 Geo. 2, c. 6; (the provisions of which as to legatees, see *ante*, p. 17, n. (e); and as to creditors, *ante*, p. 95, n. (e)). But formerly a considerable degree of doubt had prevailed with regard to the credibility of the attesting witnesses to a will. In *Anstey v. Dowling or Dowson*, one of the subscribing witnesses was a legatee; and the land devised was charged with the payment of the legacy to him, and an annuity to his wife; the witness had refused a certain sum tendered in lieu of them: there the Court of K. B. held it not to be a sufficient attestation, and set aside the will; being of opinion, that the time for the witnesses' credibility was the time of attestation. That decision was in E. T. 19 Geo. 2, A. D. 1746; 2 Stra. 1253. On this a writ of error was brought (*ante*, p. 8): no judgment was given, but it gave occasion to 25 Geo. 2, c. 6. The present case of *Wyndham v. Chetwynd*, (which fell within the exception in s. 8 of that statute), decided, that creditors, having received the amount of their debts, were good witnesses even before the statute. Afterwards judgment was given in the case of *Doe d. Hindson v. Kersey*, in E. T. 5 Geo. 3, A. D. 1765. The facts of that case, as stated in a special verdict, were as follows: J. K., by his will bearing date Aug. 1734, 8 Geo. 2, devised certain lands to trustees, in trust for the poor of the parish of M.: the three attesting witnesses were seised in fee of lands in that parish, but had conveyed away the same before the trial: three of the Judges in C. P. were of opinion, that the witnesses were credible witnesses within the statute of frauds, on the ground that they had been restored to competency before their examination. But Pratt, C. J., (afterwards Lord Camden), delivered an elaborate judgment to the contrary, in which he differed expressly from the opinion of Lord Mansfield laid down in *Wyndham v. Chetwynd*, and was of opinion; 1st, that the credibility was a necessary and substantial qualification at the time of attestation; 2dly, that if the witness was incompetent at that time, his competency could not be restored afterwards, either by release or payment; and, 3dly, that he could not be

a witness to set up any part of the will, but that the whole was void. This case, and Lord Camden's opinion at great length, are to be found in 4 Burn's Ecc. L. 97, (ed. 1809); Bac. Abr. *Wills & Testaments*, (D) 3, p. 335.

On this case it is to be observed, that, this being a devise to trustees to dispose of the rents of lands to the poor of the parish, and the witnesses being only interested as possessing property rateable to the relief of such poor, it could not come within the operation of 25 Geo. 2, c. 6. Therefore a similar case might have arisen since, were it not for the statute of mortmain, 9 Geo. 2, c. 36, passed after the making of the will. A curious question might arise in the case of a devise to a college (which is excepted by s. 3 of that act), where the will had been attested by fellows of the College, but who had resigned their fellowships before the trial.

Again, in *Pendock v. Mackinder*, a witness at the time of attesting (A. D. 1750), had been convicted of petit larceny: *Willes, C. J.*, in delivering the judgment of the Court, held that he was not a credible witness, inasmuch as he was not a competent one: *Willes R. 665, 2 Wils. 18*. Note, at that time persons convicted of petit larceny always continued incompetent; while persons convicted of grand larceny and other felonies, within clergy, having been burnt in the hand, or having undergone the punishment substituted in lieu thereof by 19 Geo. 3, c. 74, s. 3, and other felons, having served their respective terms of transportation, under 4 Geo. 1, c. 11, s. 2, are restored to competency. But now, by 31 Geo. 3, c. 35, no person shall be deemed an incompetent witness on account of a conviction for petit larceny. As to the effect of pardons in restoring competency, see *Bullock v. Dodds*, 2 B. & A. 258.

It had been decided long before 25 G. 2, that an executor, taking nothing under a will, and having no surplus in the residue, was a competent witness; *Fountaine v. Coke*, 1 Mod. 107; recognised in *Bettison v. Bromley*, 12 East, 250; *Phipps v. Pilcher*, 1 Madd. 144; see *Lowe v. Jolliffe*, *post*, 365.

HILARY TERM,—31 GEO. II. 1758.—K. B.

GODIN v. The LONDON ASSURANCE COMPANY.

S. C. 1 Burr. 489. 2 Ld. Kenyon, 254.

Insurance made
by a factor, who
has a lien on the
goods of his

SPECIAL case. Meybohm, a merchant of Petersburg, corresponded with Amyand of London, and was greatly indebted to him. Amyand sent a ship to Petersburg for goods,

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principal, does
not pass by a
consignment of
the goods insured
to a third person,
by the principal.

19th August, 1756, and insured 2800*l.* on her homeward bound voyage, *vis.* on goods from the Sound to London; whereof 1900*l.* was *underwrote on or before the 28th September, and 900*l.* on or about the 28th October: In the mean time Meybohm, on 7th September, writes to Amyand, that he should send him goods as *per* invoice, and desires him to insure. This letter arrived in October, so that only the 900*l.* could be insured in consequence thereof. After sending this letter, Meybohm indorses the bill of lading of the cargo to one Tamesz, a merchant at Moscow. Tamesz sends them indorsed to Uthhoff, his correspondent in London, desiring him to insure the whole. Uthhoff received them 15th November, and then insured with the defendant, at and from the Sound to London, for 2800*l.* acknowledging that there had been a former consignment of the goods, and an insurance thereon; and that both parties were willing to be safe. - In the voyage, the ship and cargo were totally lost. Question, whether the plaintiff as trustee for Tamesz ought to recover the whole, or only half of the sum insured?

Lord MANSFIELD, C. J., delivered the judgment of the Court:

The defendants insist, that in the present case there is a double insurance; which must mean, that the plaintiffs can recover a double satisfaction. But how can Tamesz virtually receive any benefit of Amyand's policy, though Meybohm's indorsing the bills of lading to him carried the interest insured? How does it appear, that there was any such policy as Meybohm's? *Non constat*, that Amyand insured for him at all; he certainly insured 1900*l.* on his own account. But, supposing the whole to be Meybohm's policy, can Tamesz come for a satisfaction upon it? He certainly cannot, without a declaration of trust from Amyand. Amyand, as factor for Meybohm, has possession of the policy; and factors have a lien on the goods of their principals, for their own debts. In *Kruger v. Wilcox*, 1 Feb. 1755(a), before Lord Hardwicke, the Court decreed, that a factor has a lien on goods consigned to him, for the general balance due to him, as well as for incidental charges attending the particular goods in his hands; but this lien remains so long only, as he keeps the goods in possession(b). He has a special property for this purpose. If therefore Meybohm had come against Amyand, as *trustee for the policy, he must have paid the balance due to him. But supposing it only doubtful, whether Tamesz could or could not recover, upon Amyand's policy; shall this Court put him upon the experiment, when there is no fraud, no concealment what-

Factor has a lien
on his principal's
goods, for the
general balance
due to him.

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(a) Ambl. 252.

(b) A factor has no lien on goods for a general balance, unless they come into his actual possession; *Kinloch v. Craig*, 3 T. R. 119, 783. (As to this case, see *Hammonds v. Barker*, 2 East, 227). The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by

the consignor, after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; *Man v. Shifner*, 2 East, 523. And see *Hibbert v. Carter*, 1 T. R. 745; *Wright v. Campbell*, post, 628; *Zinck v. Walker*, post, 1154.

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ever? In fact, though this is, in sound, a double insurance, yet, in reality, it is only two insurances. A double insurance is, where a full value of interest is insured on different policies, by the same man. That is not the case here.

And therefore the *postea* must be delivered to the plaintiff(c).

(c) This is considered a leading case on the subject of *double* insurance. Mr. Justice Park, in his work on Insurances, lays it down, "that where a man has made a double insurance, he may recover his loss against which of the underwriters he pleases, but he can recover for no more than the amount of his loss—he shall recover but one satisfaction, and he may fix upon which of the underwriters he will for the payment of his loss; but it is a principle of

natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured;" p. 423, (ed. 1817). See *Newby v. Reed, post*, 416. A *double* insurance is not to be confounded with a *re-assurance*, which is made illegal by 19 Geo. 2, c. 37, s. 4, except in certain cases there specified. See Park's Ins. c. xv. p. 418.

MICH. TERM,—32 GEO. II. 1758.—K. B.

BASKET v. The University of CAMBRIDGE.

S. C. 2 Burr. 661. 2 Ld. Kenyon, 397.

University of Cambridge is entrusted with a concurrent power of printing acts of Parliament and their abridgments, together with the King's printer.

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A. D. 1547.

THIS was a case stated by order of the Court of Chancery, 24th January, 1743, and was then several times argued; but lay dormant for many years, till the suit was again revived this year, and finally determined.

22d April, 1 Edw. 6, A. D. 1547, The King, by letters patent, granted to Richard Grafton the office of printer of all statutes, books, acts and other volumes, by the King, his heirs and successors, then published or to be published, in the English tongue, the Latin grammar excepted, with a fee of * 12d. and an annuity of 4*l.* sterling, to hold and receive the same, from the death of Thomas Bartlet, King Henry the Eighth's printer, for life of said Richard Grafton, and prohibited all his subjects to print any book or work of the King's, in the English tongue. 29 December, 1 Mar. A. D. 1553, The Queen, on surrender of Grafton, granted the same office to John Cawood for life, with all profits, &c. 24 Mar. 1 Eliz. A. D. 1558, The Queen granted said office to Richard Jugge and John Cawood for their lives, and the life of the survivor, if it should so long pleasure her, with an express mention of service books in this patent. 27 September, 19 Eliz., The Queen granted said office (including also bibles and testaments, as well as service books) to Christopher Barker for life.* 18 August, 31 Eliz., The Queen granted said office (including also abridgments of statutes) to Robert, son of Christopher Barker and his executors, &c. immediately after the decease of Christopher, for the life of said Robert Barker; or, if he died in the lifetime of Christopher, then for four years after the death

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of Christopher. 10 May, 1 Jac. 1, The King granted said office to Christopher, son of Robert Barker, his executors, &c. immediately after the death of said Robert, for life of said Christopher; or if he died in the lifetime of Robert, then for four years after the death of said Robert. 11 February, 14 Jac. 1, The King, reciting death of said Christopher the father, granted said office to Robert son of said Robert Barker, his executors, &c. immediately after the death of Robert Barker the father and Christopher his son, for thirty years. 20 July, 3 Car. 1, The King granted to Bonham Norton and John Bill, assignees of said Robert, Christopher and Robert Bar*ker, the said office, for the interests then subsisting, with more large and ample words of *solely printing* said books, in which are particularly included statutes, and abridgments of statutes. 26 September, 11 Car. 1, The King granted the said office in remainder to Charles and Matthew Barker, their executors, &c. for the term of thirty years after the expiration of the several terms then subsisting. 24 December, 27 Car. 2, The King, reciting that the estates and interests of Robert Barker the father and Christopher the son, were determined; granted said office in remainder to Thomas Newcombe, and Henry Hills, their executors, &c. for thirty years after the expiration of the terms then subsisting. 13 October, 12 Ann., The Queen granted said office in remainder to Benjamin Tooke and John Barber, &c. for thirty years, from the expiration of the former patent; which new grant took effect 10th January, 1739, and is now by several mesne assignments vested in the plaintiffs, who have been sworn into the office of King's printers. The plaintiffs and their predecessors have, by virtue of said letters patent, printed all acts of Parliament, and abridgments thereof, and Bibles, Testaments, &c. therein mentioned, and claim the sole right of printing all acts and abridgments thereof, exclusive of all other persons.—20 July, 26 Hen. 8, The King granted to the Chancellor, &c. of Cambridge, licence to assign three printers; who might lawfully there print and put to sale all manner of books approved by the Chancellor (or his Vice Chancellor) and three doctors.—Stat. 13 Eliz. c. 29, confirms said letters patent.—6 February, 3 Car. 1, The King, reciting the charter of the Company of Stationers, and his own printers, and a decree in the Star-Chamber, 23 June, 28 Eliz. confirming the ex*clusive privileges thereby granted, which decree was by proclamation, 25 September, 21 Jac. 1, commanded to be strictly observed, and also, that disputes had arisen, whether the said prohibitions extended to the printers of the University; his Majesty, for the encouragement of learning, and to end all controversies, ratified and confirmed the privilege of the charter 26 Hen. 8, and declared, it should be lawful for the University printers, with the approbation aforesaid, to print all books contained in the charters before recited, or any others granted to any person whatsoever, and to sell the same, without incurring any penalty or forfeiture; any thing to the con-

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trary thereof notwithstanding. The defendants insist, that the plaintiffs have not the sole right of printing statutes, abridgments of statutes, Bibles and Common Prayer books, exclusive of the said University; who have a right, under the said letters patent, to print the same with the approbation aforesaid. The University printers have, from time to time, printed Bibles and Liturgies, and all such other books, as had been allowed and approved of in manner aforesaid. They have constantly printed the Acts of Uniformity, and vended them with the Books of Common Prayer; but it doth not appear, that they have printed any statutes or abridgments of statutes, except said Acts of Uniformity, till the printing of the book in question in this cause. About 1 July, 1740, the University, under seal, appointed Joseph Bentham, a person duly qualified, to be one of the said University printers. 19 March, 1741, the Chancellor and three doctors, in due form, allowed and approved a book entitled, "An exact Abridgment of all the Acts of Parliament relating to excise on beer, ale, brandy, vinegar or other liquors, with some few notes and references," to be printed by said Bentham, who printed *the same accordingly, and the same have been since vended and sold by him and Charles Bathurst in London.

The questions upon this cause are,

1. Whether the plaintiffs are entitled to the sole right of printing acts of Parliament, and abridgments of acts of Parliament, exclusive of all other persons, during the term granted by the letters patent dated 13th October, 12 Anne? 2. Whether the defendants, the Chancellor, Masters and Scholars of the University of Cambridge, by virtue of the grants and act of Parliament insisted on by the said defendants or any of them, have the right or privilege of printing acts of Parliament or abridgments of acts of Parliament?

Mr. *Comyns*, for the plaintiff, argued, that it would be admitted, that the Crown by prerogative has the sole right of printing acts of Parliament; the question being, whether the plaintiff has a grant of that right in exclusion of all others, or whether the University has a concurrent right with the plaintiff; for as to all others, his right is clearly exclusive. The first consideration is; whether the several letters patent, granted to the plaintiff and the University, are grants of the same thing. If so, then *2dly*, whether they can consistently stand together. The office of King's printer is very antient, having subsisted ever since the introduction of printing into England. The patents stated deduce it regularly down from 1 Edw. 6, *A. D.* 1547; and during all that period, this officer alone has printed all acts of Parliament, and abridgments thereof, till the University printed the book in question; which, however it might be of advantage to the printer, was of none to the learned body. Before printing was introduced, *temp.* Hen. 6, the usage was to transcribe all the acts at the end of every sessions, and *send them to the sheriff, with a writ commanding him, to proclaim

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them in his county court, where the transcripts were kept, for the public to resort to; 4 Inst. 26 (a). And this writ continued till the time of Hen. 8, which shews that the art made but a slow progress. But from the first printing of the acts, it appears, they were printed by the King's printer; for though we have no patent till Grafton's, 1 Ed. 6, yet that refers to an appointment of Thomas Bartlett under Hen. 8; and though we cannot find his patent, we have found the grant of the annuity of 4*l. per ann.* 21 H. 8, which was five years before the patent to the University. The patents from the time of Car. 1, have the words *solely to print*, which might be inserted to prevent doubt, but were not necessary; because the sole right of printing statutes belongs to the office of King's printer, an office which the law takes notice of, and gives credit to: and therefore, 16th July, 1735, between *Edwards* and *Vasey*, it was held by Lord *Hardwicke*, C. J. at *Nisi Prius*, that an act of Parliament, 13 Car. 2, not in the statute book, might be given in evidence, if printed by the King's printer. The Legislature and public are concerned to see the statutes accurately printed. Before the time of printing, the House of Commons (according to Lord Coke) used to depute some of the members, to examine the transcripts. Afterwards, the King's printer was substituted in their room, who is a person known and answerable to the public: but if it was left to the care of many persons, there is danger of incorrectness, and no one answerable. There is a difference between acts of Parliament, which are the King's property, and to which he is a party, and the works of individuals. If therefore the King has a right to appoint a person to print them, which he undoubtedly has, and has created such an officer, the right of such officer must be exclusive, he having the King's first grant. For the King can't grant the same office, at the same time, to different persons, nor the office to one and the profits to another.

* Henry 8 could not intend to give the University a power of printing acts of Parliament; because acts of Parliament are of a nature universally binding, and cannot be the object of approbation or disapprobation, by the Vice-Chancellor and three doctors. And though the patent says, *all manner of books*, yet acts of Parliament do not fall under that description: "A book is a writing composed on some point of knowledge, by a person intelligent therein (or by some man of wit or learning) for the instruction or amusement of the reader:" Chambers's dictionary, *voc.* Book (b). Acts of Parliament are more properly considered as records, prohibitions, injunctions, &c. Thus, by statute 13 & 14 Car. 2(c), No person shall print books or pamphlets, without entering them at Stationers'-hall. But this extends not to acts of Parliament, but books of science; for they are not to meddle with acts of Parliament or books of state (which are expressly excepted) nor to any book, to which the King's patentee

(a) See Preface to Ruffhead's Statutes, xii. xvii.; Hale's Hist. Com. Law, 13, (Runnington's ed.); 2 Inst. 526, 644, 670; 1 Ld. Raym. 501.

(b) Post, 121, n. (g).

(c) C. 33, s. 3: Ruffhead's St. vol. ix. Append. p. 190.

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has the sole right. *Hills and University of Oxon.*, 1 Vern. 275. The preamble also of the statute 13 Eliz. shews what books were allowed to the University—"for the advancement of *good* and *godly* literature." The patent of Car. 1, gave no new privilege, but only confirmed the old. It gave not such a power as is now contended for, of printing acts of Parliament, because it has not specified them, which all the co-temporary patents of the printers have; and this power cannot arise by implication. This consideration, joined to that of requiring the academical approbation, clearly proves the King's intention. Where the Crown has power to grant many things, and grants some by express words, the Court will not extend the grant to others, which are not mentioned. Davis, 55; by a grant of the river Thames to the city of London, the soil under it did not pass; and therefore a new grant of the soil was obtained, by which [*112] the city enjoys the buildings on London bridge. *But if the patent of Car. 1, had granted this privilege to the University in express terms, it would have been void, the King having, but the July before, granted the same powers *solely* to another. He was therefore deceived in his second grant; in which case, the first patentee may bring a *scire facias* to reverse it; Dyer 197, pl. 45: Bro. tit. Sci. fa. pl. 176; Cro. Car. 197; 1 Mod. 256; Skynn. 233. There is no difference between acts at large, and abridgments. Both are granted to the King's printer, but neither to the University. The last argument arises from usage, which is the best interpreter of such grants. The King's printers have solely exercised this right, for two hundred years, without interruption from the University, or claim of a concurrent right. If such a power was given them by patent, 3 Car. 1, they never have exerted it for one hundred and twenty years. In *Seymour's Case*, 1 Mod. 256, the Court said, "great regard was to be paid to usage." We have been in uninterrupted enjoyment of this privilege for two centuries, under the letters patent of Hen. 8, Edw. 6, Mar., Eliz., Jac. 1, Car. 1, Car. 2, and Ann. Therefore, we hope, it shall not now be taken from us.

Yorke, Solicitor-General, for the defendants, argued,—That though there are two questions stated for the opinion of the Court, occasioned by the different pretensions of the parties, this would not restrain the Court or counsel, from considering them as a single question, "Whether the plaintiff has an exclusive right of printing acts, and abridgments of acts of parliament." This is a question of great moment to the University, and to the public. To the former, as it affects a right granted to them, by the bounty of former princes: To the latter, as the public is interested, in preventing of such monopolies. [*113] *Both parties admit the prerogative of the Crown to grant such patents; they both found their claims on it(d). And it will be necessary to open the grounds of this prerogative, in the present case, to make the subsequent argument the more intel-

(d) See post, 304, *Tonson v. Collins*.

ligible. We will therefore consider, 1. The prerogative at common law, before and at the time of granting these patents, and how assumed: 2. The construction of the patents of the University and the King's printer, distinguishing between that of Hen. 8, and Car. 1; because, if any doubt arises on the former, the latter may be considered as an original grant: 3. The usage in consequence of those grants, which is certainly a very material ground of argument.

1. The King has no power at common law over the art of printing. The art is mechanical; and admitting that the first printer in England was brought to Oxford by Archbishop Bouchier, at the expense of Hen. 6, that would not make it a royal art. But, in fact, the King has no pretence to such a right by purchase; for the story itself is false, as is proved by Dr. Middleton in his dissertation on printing. In the *Stationers' Company* and *Partridge*, M. 11 Ann(e), it was said, that by the same rule you might make a monopoly of the art of an apothecary; and Moor 675, was cited to shew, that the first apothecary was brought into England, at the King's expense, from Flanders. No previous licence for mere printing was necessary at common law; the Crown never pretended to such a prerogative. This would have been treating things as *mala in se*, before their existence, which are only so by accident. If a man publishes any thing of an immoral tendency, the Court will punish it after publication, but cannot animadvert on it before, or restrain the liberty of printing. This doctrine has always prevailed more or less, but more especially since the revolution. In 1664, a dispute happening between the Stationers' Company and Col. Atkyns (who was a vain man) the law patentee, he invented this fiction, that printing was a flower of the Crown, acquired by Hen. 6, by purchase, as above mentioned; *Carter 89 (f). Hale, C. J., gave judgment for his patent; but 26 May, 1675, that judgment was reversed by the House of Lords. Lord Anglesey, who with many others spoke long and learnedly in the debate, proposed to refer the question to all the judges; but was outvoted and entered his protest, though without any reasons, according to the practice of those times. The King indeed by prerogative has several copy-rights. 1. Of all acts of state, to promulge them to the people: 2. Since the supremacy has been established, of all books of the rites and services of the church(g): 3. The translation of the great English Bible, under Grafton, was performed at the King's expense, which gave him another kind of right: 4. So the year-books, taken at the expense of the Crown, gave the King a property by purchase. Thus was *Seymour's Case*, 1 Mod. 256(h), argued by Serjeant Pemberton; and it is the only rational way of

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(e) 10 Mod. 105.

(f) Post, 305, 327.

(g) The exclusive right of the Crown to print acts of Parliament and books of divine service, was established in *Eyre v. Carnan*, Bac. Abr. *Prerogative* (F) 5, pa. 597: see also Com. Dig. *Trade* (B. D. 4.)

(h) S. C. 3 Keb. 792. In that case it was held, that the Company of Stationers had an exclusive right to print almanacks. But the contrary was afterwards decided in *Stationers' Comp. v. Carnan*, which see, and the cases there cited, post, 1004: mentioned also in 13 Ves. Jun. 508.

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treating the subject. The Crown never exercised the art of printing *solely*, by its own servants or patentees, neither in the time of Hen. 8, nor at any time since; not even in the memorable æra of 43 Eliz., when such a catalogue of monopolies was laid before the House of Commons, that one of the members said, they should soon hear of a patent for the sole making of bread. The first printers in England exercised the art, without any licence for that purpose. Caxton, whose merit is so conspicuous, and who printed here so early as 1471, though in great favour with Edw. 4, the Duke of Clarence and Hen. 7, and therefore might certainly have obtained such a privilege, if it had been thought necessary, yet in all his books modestly speaks thus of himself, "Done by me simple man William Caxton," and has no *imprimatur* or *cum privilegio*; as may be seen in Ames's *Typographical Antiquities*, which contains the title-pages of all books printed in England from 1471. Even Hen. 8, however arbitrary, never claimed a prerogative over the press. *Imprimaturs* were first introduced by the acts of uniformity, and borrowed from the Inquisition. There is but one instance of a prohibition of printing any book previous to Hen. 8th's grant to the University in 1533; viz. in 1526, *mentioned by Fox (*Martyrs* 290), and plainly founded on stat. 2 Hen. 4. c. 15, against heresy, and not on any royal prerogative. About seven years after, the grant to the University was made; and in about five years after, 1539, an injunction issued, prohibiting the importation of books from *abroad* (i); but this did not relate to books printed here, and was only in consequence of stat. 25 H. 8, c. 15. From this time, there was no act of the Crown relative to this matter, for twenty years, when by stat. 3 & 4 Ed. 6. c. 10, the Parliament interposed with respect to superstitious books. In 1555, 2 & 3 P. & M. there was a proclamation against importing heretical books, (as they stiled all the writings of the reformers) and this likewise was founded on stat. 2 H. 4, against heresy. In 1556, 4 P. & M. came the Stationers' patent, requiring all printers to be of that company. In 1558, 1 Eliz., their charter was ratified, and a right given them to seize books printed without their licence. And in 1559, a proclamation was issued against heretical books, containing also injunctions with respect to the morality of pamphlets, &c., and other provisions, which required all printers or authors to be licensed *per* the King, Archbishop or Chancellor of the Universities. As soon as the Company of Stationers became a corporation, the Starchamber interposed to support what neither the law nor the subject will ever endure. Hence several ordinances in 1566, signed *per* Lord Burleigh and the commissioners for religious matters. These were enforced in 1586. And afterwards in 21 Jac. 1, the famous decree of the Starchamber was made, which is recited in the letters patent, 1627. In 1643, several ordinances of Parliament were made or transcribed from these decrees; and all

(i) *Stationers' Comp. v. Lee*, 2 Show. 258, S. P.

were united together in the licensing act 13 & 14 Car. 2. This statute subsisted in full force till 1692, four years after the revolution, when the liberty of the press was restored. Thus we have traced the history of licensing to its source, and shewn its commencement to have been twenty-five years after the grants to the University of Cambridge. There are some instances of particular patents, by way of protection to authors, in the nature of new inventions, to be found in Rym. Fœd. but those were only temporary. *The King claimed copy-rights of acts of Parliament, before this grant of Hen. 8; being proclaimed by his servant the sheriff, and printed by his printer. For Bartlet stiles himself printer to Hen. 7, and Hen. 8, from 1503 to 1528, and is recognised by the latter as *impressor noster*. But these grants of the office of printer were not of an exclusive nature, as may be gathered from civil and literary history. But the copy-right of the King was still asserted, as well to books of religion as acts of Parliament; for divers learned men of both Universities obtained a grant of these, about the year 1531 and 1533; notwithstanding which, R. Grafton (who was a zealous friend to the Reformation, and had begun a translation of the Bible into English, under Francis I. of France) was in 1540 entrusted to print the great English Bible, and enjoyed his patent some years; though Queen Mary afterwards obliged him to resign it, for printing Lady Jane Gray's proclamation, Rym. XIV, 766. A like copy-right was claimed to Lilly's grammar, recommended to be used in all schools, they being then subject to the ordinary's visitation. See Wood's preface to Lilly's grammar, A. D. 1754. The Crown therefore has no prerogative at common law over the art of printing; but is merely entitled to some special copy-rights. [*116]

2. With respect to the construction of the patents; we will consider first, the patent 26 Hen. 8, to the University, and the several patents of the King's printers, down to 3 Car. 1; Secondly, The patent 3 Car. 1, and other subsequent grants.

First, The patent Hen. 8, as well as Car. 1, is general, "*omnes et omnimodos libros*;" those, to the King's printers, comprehend "all statutes, acts, &c., except grammars," and in Queen Elizabeth's, there are additional words, "Bibles, New Testaments, &c." The right of the University is *local*, of the printers, is unconfined. We admit, that the King cannot derogate from his own grant; and therefore, all clauses of *non obstante* are useless. It will *also be admitted, that where there is any particular thing, within the description of the grant, on which it may operate, it shall not be extended farther by any implication. To what then do the words of the patent Hen 8, extend? Not to exempt the University printers from the review of a royal licenser; for no such power then existed. It must operate therefore on the copy-rights; it hath no other subject matter to operate upon; the King had no other right to grant. As to the exclusive right to print these copies, said to be incident to and inherent in, the office of King's printer; the law knows no such officer by prescription, nor by act of Par- [*117]

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liament. It will not therefore protect him, and say, that the King (who made him) shall not grant the same concurrent privilege to another. In the case of judicial offices, the King (upon general grounds of policy) cannot sever the powers of the office: *e. g.* If the King should grant to the Chief Justice of the King's Bench the sole power to issue writs of *mandamus*, it would be void; but the power would remain incident to the general jurisdiction of the Court. But, in ministerial offices, like this, it is otherwise: *e. g.* The clerk of the Crown in Chancery is an ancient office by prescription; but K. Jac. 1, granted away many powers, which were before incident to that office; as, that of granting licences of alienation, which continued from that time a distinct office, till the abolition of the court of wards. The clerk of the patents was also severed from that office by Jac. 1, and so remains to this day. Upon these principles therefore, supposing printership to be an office, the King may name as many printers, as he pleases. But, in fact, the King's printer is not, as said, an officer introduced in the room of the ancient transcribers, &c. The records of Parliament are now made up, exactly as they formerly were. Besides, of a mere private act a printed copy is no evidence^(k); it must still be examined by the rolls; and the case of public acts (as that before Lord *Hardwicke*) is this, that the law supposes them in *pectore judicis* already, and only allows the statute book to be read, to assist the judge's memory. Lord *Mansfield*, C. J., here observed, "that such assistance was now indeed quite necessary, for the acts of 29 Geo. 2, were as numerous as the whole reign of Elizabeth^(l)." *As to the definition of a book from Mr. Chambers, Pliny is at least as good an authority; who in his *Natural History* says, that *liber* is the inner bark of a tree, and was used for writing on, and when rolled up together was called *volumen*. *Volumen* then and *liber* are synonymous; and as the statutes are certainly *volumina*, the right of printing them may well pass under the name of *libros*^(m). The objection, that statutes are not the objects of academical approbation or disapprobation, extends equally to Bibles and common prayers, which they have always printed; and yet the former cannot be reviewed but by the authority of a general Synod, nor the latter, but by the authority of Parliament. And therefore, the approbation extends only to the propriety of printing, in such time, place and manner as is desired. It was well argued, in Carter 91, that it was one thing, to say a book deserved to be printed, and another thing, to give it the *imprimatur* of the University. The last objection is to the generality of the words in this grant. I agree, that the King

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(k) A special clause is now usually inserted in private acts, providing that the act shall be deemed public; in which case the copy printed by the King's printer will be sufficient evidence of the contents: See Bull. N. P. 222; *Samuel v. Evans*, 2 T. R. 569; *R. v. Shaw*, 12 East, 479. See also

R. v. Sutton, 4 M. & S. 532, and 41 G. 3, c. 90, s. 9.—*Stark. Ev. P. ii.* 162.

(l) And the printed statutes, subsequent to 29 G. 2, extend to twenty-one volumes, each volume containing, on an average, 800 closely printed quarto pages; making a total of upwards of 16,800 pages.

(m) *Post*, 121, n. (q).

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cannot convey special prerogative rights by general words, where there are general prerogative rights, that may pass to satisfy the grant. In this, the King's grant differs from that of a private person; but to illustrate this rule: 1. If under a general name, a grant comprehends things of a royal and of a base nature; the base only shall pass: 2. If the thing expressly granted cannot pass, without implying something not granted; it shall be void rather than operate to two intents: *e. g.* A grant of lands to an alien born shall not make him a denizen, by implication; or, if to a felon, shall not amount to an implied pardon; Bro. Patent. pl. 63, 5 Rep. 56: 3. If two things are mentioned in the King's grant, equally in his power to grant, and it is dubious, which was intended; it is void for uncertainty, 12 Rep. 86; and therefore also, by a grant for no certain estate, nothing, not even an estate at will, shall pass; Dav. 35—45. But this case stands on different grounds; for if the general words comprehend two things, not equally in the King's power to grant, that which is in his power shall pass. So *here, it was not in the King's power to grant a right of printing in general, that being of common right before; but it was in his power to grant the privilege of printing copy-rights: and therefore, as the general words will comprehend both, the latter must necessarily pass, that the grant may take effect, and not be a void grant. 8 Rep. 56, 167; 2 Inst. 496, 497, upon the statute of *quo warranto*. This reasoning is strengthened by the statute 13 Eliz. which confirmed the grant of Hen. 8, (in its general description) "According to its true meaning and intent."

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2d.—Let us now consider the patent of 20 Jul. 3 Car. 1, to the assignees of the Barkers, and the patent 6 Feb. following, to the University. The former (in which the words *solely to print* are first found) gave an alarm to the University; whereupon the King, reciting the doubts that had arisen, gave them a power to print all books mentioned in the patents of his printer, &c. This charter contains words, both of confirmation and original grant. If therefore the patent of the King's printers was an exclusive one, it was only for the term then subsisting, which expired in 1679; and from that moment the charter of Car. 1, to the University might have been pleaded, either as an original grant, or as a confirmation of the charter of Hen. 8. But I will argue it now as an original grant; and, in that light, it was good by way of reversionary grant, as much as if it had been in possession, notwithstanding it is granted by general description; 6 Rep. 56, *Ld. Chandos's Case*. The King will suffer no detriment by such a construction; he was not deceived in his grant (*). He intended to pass the whole interest then subsisting in himself, having recited the whole in the patent. So that from 1679, the University became as fully entitled to the King's copy-rights (o), by way of reversion, ex-

(*) See Com. Dig. *Grant* (G 8, 9); Bac. Abr. *Prærog.* (F 3); *Scire facias* (C 3).

(o) Lord Eldon, C., speaking of the authorities of the Universities to print, said, "This is said to be a mere license. There

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pectant on the determination of a particular estate, as if they had been in immediate possession from the year 1627. The King is not restrained to any particular mode of granting, as bishops, &c. are. Show. Parl. C. The Case of *The Master of the King's Bench Office*.

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*3. Upon the head of usage, which is to be regarded as the exposition of time, and has so much weight, that the King himself is bound by it; 2 Roll. Abr. (Prerog.) E. 195; in common construction, by a grant of goods and chattels, choses in action shall not pass. But in a grant of *bona et cattalla felonum* (as a liberty) debts due to the felon shall pass; because by such grants of liberties, choses in action have *used* to pass. How then has the usage stood in this case? Have the King's printers excluded all others? History will inform us to the contrary. Nay, statutes printed by others are now to be purchased. In 19 H. 7, Berthelet was the King's printer, but there are statutes of that date printed by Wynkyn de Werde and others. In 1553, the statutes are printed by Grafton, though Berthelet was then alive, and Grafton's patent did not take effect till Berthelet's death. So in latter times, the law patentees have exercised a concurrent right with the King's printer. In 1636, the statutes were printed by the assignees of Moor. In 1667 and 1670, by the assignees of Atkins, without naming the King's printer. Keble's edition has the assigns of Sayer, the law patentee, joined with the King's printer; and so has the late edition. As to law books; in 1605, John Legat printed for the University Dr. Cowel's Institutes; and the right was not disputed: and had the University printed Rolle's Abridgment (*p*), as the Company of Stationers did, they would have shewn a very different title for so doing. But it is stated, that the University have all along printed the Acts of Uniformity; and though with the Prayer-book, yet the Act is the principal, and the Prayer-book only an accessory: and printing one act is the same to maintain a right, as printing the whole body of statutes. Besides, the argument is much stronger in favour of abridgments; which are works of a different species, requiring labour, judgment, and learning in the author: and therefore Mr. *Coomyns's* reasoning is not applicable to them. As to the inconvenience the public may sustain by giving this power to the University, none such can arise by allowing two or three concurrent rights. An emulation will be excited, which will probably produce correcter, as well as cheaper editions. For several editions printed by the King's printer are *so incorrect, that the record has been frequently resorted to, to guard against

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is considerable doubt, whether it is not in its nature very like that to the King's printer; though he has it under the denomination of a grant of the office; which, however, as to the execution of the duty, is nothing but an execution of authorities given to it. I doubt whether Mr. Yorke is correct in considering these patents as vesting the King's copy-rights. It may

very well be argued, that they remain still vested in the King; and the grants are nothing more than authorities to exercise the right of multiplying those copies, which, if not granted, remain vested in the King, exercising them according to the public necessity, charging reasonably;" 6 Ves. Junr. 712.

(*p*) Carter, 89.

the infidelity of the copy. The public then will be advantaged by it, and a dangerous monopoly overthrown, which construction is the most consistent with law and reason.

Mr. *Comyns*, in reply, observed, *inter alia*, That the King's printer might be restrained from setting exorbitant prices on his books, by stat. 25 Hen. 8, c. 15, and another of Queen Anne, but that the Universities were therein excepted, and therefore under no restraint.

17th November, 1758, On the argument, Lord *Mansfield*, C. J., observed, that, whether the Crown, in fact, meant to assume a power over the art of printing in general, when these patents were granted, or whether only over copy-rights, it is clear, they can only operate in point of law as to the copy-rights of the Crown; for the construction of law is, that the Crown intended only to do that, which by law it is entitled to do. It is admitted, that, by the words *omnes et omnimodos libros*, the University may print Bibles, &c. The whole distinction then is, between those and acts of Parliament, or, in other words, whether acts of Parliament are *books*? (g).—Great pains have been taken, and the subject exhausted. The Court is well satisfied in opinion, and will certify into Chancery this Term.

Copy of the Certificate.

“ Having heard counsel on both sides, and considered of this case, we are of opinion, that, during the term granted by the letters patent, dated the 13th October in the 12th year of the reign of Queen Anne, the plaintiffs are entitled to the right of printing acts of Parliament, and abridgments of acts of Parliament, exclusive of all other persons, not authorized to print the same by prior grants from the Crown.

“ But we think, that, by virtue of the letters patent, bearing date the 20th day of July, in the 26th year of the reign of King Henry the 8th, and the letters patent, bearing date *the 6th of February, in the 3d year of the reign of King Charles the 1st, the Chancellor, Masters, and Scholars of the University of Cambridge, are INTRUSTED with a concurrent authority, to print acts of Parliament and abridgments of acts of Parliament, within the said University, upon the terms in the said letters patent (r). [*122]

“ 24th November, 1758.

“ MANSFIELD.
“ T. DENISON.
“ M. FOSTER.
“ E. WILMOT.”

(g) The etymology and meaning of the word *Book*, and what may be considered a book within the meaning of the Copyright Act, 8 Ann. c. 19, s. 1, is ingeniously discussed in *Hime v. Dale*, 2 Camp. 27, n. (b), 11 East, 244, n. (a). A musical composition on a single sheet is privileged as a book; *Clementi v. Golding*, 2 Camp. 25, 11 East, 244.

(r) The right of printing in the Universities, and by the King's printer, underwent considerable discussion in a case, where the two Universities had obtained an injunction against certain booksellers, to restrain them from importing and publishing in England, Bibles, &c. printed in Scotland by the King's printer there. The King's printer in England, having refused

BASKET
v.
CAMBRIDGE
UNIVERSITY.

N. B.—In a letter from Mr. Justice Foster to W. B. at Oxford, dated December 11, 1758, and enclosing the foregoing certificate, he expresses himself in these terms :

" I thought it would be agreeable to you, to know the issue of the cause, between the King's printers and the University of Cambridge, as far as concerns the proceeding in our Court: and have therefore enclosed our opinion. What hath been done in the Court of Chancery upon our certificate, I have not heard. The words underlined were thrown in, by way of an intimation to the University, that we consider the powers given by the letters patent, as a trust reposed in that learned body, for public benefit, for the advancement of literature, and not to be transferred upon lucrative views to other hands. I hope both the Universities will always consider the Royal grants in that light."

The plaintiff's bill was (I apprehend) dismissed in Chancery, and the injunction, restraining the sale of the book in question, was dissolved.

to join in the bill, was made a defendant. Upon a motion made to dissolve the injunction, upon the answer put in, the Lord Chancellor considered the plaintiffs entitled to have it continued till the hearing, and there said,—“ There is also ground, in the certificate, in *Basket v. the University of Cambridge*, for considering the grant of the office as really nothing more than a grant of authorities. The expression is, that the Universities ‘ are entrusted with a concurrent authority.’—Whether others have more authority must depend upon the effect of the instruments. But if the grant is nothing more than of the King's authority, there is a necessary exclusion. The officer must of necessity have the duty as well as the right of exclusion, from the duty of the Crown on behalf of the subject to exclude others. The effect of that certificate is, that with respect to prior patents to the King's patentees, they had the effect of preventing the King from granting concurrently to the Universities; which could have no operation till the prior patents ceased. If the grant to the Universities had been as universal in point of extent, instead of being limited, upon the same principle it must have been held that the grant to the King's

printer, subsequent to that to the University, could have had no effect: but it was held a grant of part of that interest, which had been granted by the prior grant, and which would take effect when the prior grants ceased to have effect; that it has become split; this grant being only to print in the Universities, and sell everywhere in England: the other to print everywhere: they are consistent in this sense. The two patents amount to an apportionment into different proportions of the authority, carrying along with it the duty, and therefore in some degree the right to exclude. Mr. Yorke so considers it, and puts it strongly, as a concurrent right to print, and then it must be to exclude;” *Universities v. Richardson*, 6 Ves. Junr. 689, 712; see also *Grierson v. Eyre*, 9 Ves. Junr. 341, post, 371, n. and *Anon.* 1 Vern. 120.

It has been determined, that a copy of every book, composed since 8 Ann. and published for the first time, shall be delivered to the Stationers' Company, for the use of the Cambridge University library, though such book has not been registered with the Stationers' Company, under the provisions of that act; *Cambridge University v. Bryer*, 16 East, 317; See 54 G. 3, c. 156, s. 2.

HILARY TERM,—32 GEO. II. 24 JAN. 1759.—CHAN.

BURGESS v. WHEATE.

S. C. 1 Eden, 177 (a).

Present { Lord Keeper, HENLEY; Chief Justice of the King's
Bench, Lord MANSFIELD; Sir THOMAS CLARKE,
Master of the Rolls.

MASTER OF THE ROLLS.

THE matters in question between the parties come before the Court in two several causes: one is set down for further directions, in consequence of a reservation in a decree of the late Lord Chancellor, referring a case and several questions to the Judges of the Court of King's Bench, for their opinion. They have certified their opinion to the Lord Keeper, and he seems inclined to confirm that certificate: and that cause is now set down for further directions.

They come before the Court in another cause, on an information filed by the Attorney-General, on behalf of the Crown. The Attorney was a defendant in the original cause; so that the information here is in the nature of a cross bill.

The case on which the matters arise is this:—Lawrence Bathurst was seised in fee of the manor of Lechlade, &c. in com. Glouc. and he having a mind to raise a sum of money out of part of the estate, by deed, 25th March, 22 Car. 2, creates a term of one thousand years, and vests it in trustees, in trust for himself and his heirs, executors, and administrators. *Lawrence Bathurst, in his life-time, as he had created a term to raise money, made a mortgage, for five hundred years, of that part of the premisses, for securing the payment of 800*l.* and 400*l.*, and that mortgage, by several mesne assignments, became vested in John Chandler. Soon after this he died, leaving issue Sir Edward Bathurst, his only son and heir, and two daughters, Ann and Mary; and the premisses descended to his son, subject to the mortgage as to part. The widow of Lawrence Bathurst (*Q.* how entitled?) (*b*), after his death, borrowed a sum of money, and assigned over, as a security, the residue of the one thousand years' term. Sir Edward Bathurst died an infant; in consequence of which, the estate descended to Ann and Mary Bathurst, his sisters and co-heirs. Ann intermarried with John Greening, and Mary with John Coxeter; and there-

A trust estate is not liable to escheat. In the case of lands held by descent from the paternal ancestor, where the *cestui que trust* dies without heirs *ex parte paternal*, the trustee shall retain them for his own benefit, as well against the heir *ex parte maternal*, as against the lord claiming by escheat. 25 March, 22 Car. 2.

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One thousand years' term.
Five hundred years' mortgage term, vested in Chandler.

Assignment of the residue of one thousand years' term. Descent in coparcenary to Ann and Mary.

(a) In which report, the judgments of the Master of the Rolls and Lord Mansfield are precisely the same as those given here: but there is a considerable difference in the judgment of the Lord Keeper, which is given there more at large, but is in sub-

stance the same.

(b) By his will he made his widow Susannah his sole executrix, who thereby became entitled to the residue of the term of 1000 years.

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v.
WHEATE.**

Settlement of
Anne's moiety,
21 Aug. 1686.

upon the husbands and wives (in right of the wives) became entitled to this estate, in undivided moieties.

Greening and his wife made a settlement of their moiety, 21 August, 1686, and covenanted to levy a fine to the use of such persons, &c. as the husband and wife should jointly appoint, by any deed or will duly attested; and for want of such appointment, to themselves for their lives, and the life of the survivor; remainder to the heirs of their bodies; remainder to the right heirs of the survivor.

M. 1689, bill of
partition.

Mich. 1689; Coxeter and his wife filed a bill of partition of the estate; and the usual directions were given on the decree, and also that the incumbrances should be discharged in equal moieties. Afterwards an allotment was made by commission;

Allotment.

and Greening and his wife, being dissatisfied with their allotment, applied to the Court for a new commission; but the other sister, agreeing to give up her allotment, and to make an exchange with her sister, that was accordingly accepted; and the allotments were exchanged, and conveyances executed.

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Exchange.

Ann died.

March 1693; Ann Greening died, not having joined with her husband in any appointment. In consequence of which, the husband, by the settlement of 1686, became entitled to the inheritance of her moiety. And in December, 1694, he died *sans* issue, and the moiety descended to Elizabeth Greening, his niece and heir, *ex parte paternâ*, being the only child of Thomas Greening, his eldest brother. She afterwards married with Nicholas Harding, but previous to that marriage, a settlement(c) was made, on 15th and 16th August, 1695, of this moiety to the use of the husband for life; then the wife for life; remainder to trustees to preserve contingent remainders; remainder to trustees for ninety-nine years, on a trust that never arose; remainder to their first and other sons in tail male successively; remainder to trustees for five hundred years, on trusts that never arose; remainder to the right heirs of Elizabeth Greening.

Husband entitled, and died.

Descent to Elizabeth Greening, wife of Nic. Harding.
Marriage settlement.

Bill to perfect
the partition.

Michaelmas 1695; Harding and his wife brought a bill to perfect the partition, and to divide other lands, omitted in the former partition. A decree was accordingly made for mutual conveyances; and a commission issued, to divide the rest of the premises. And in January, 1698, conveyances were mutually executed. Coxeter died, and his wife survived him; and released her interest, in a moiety of the equity of redemption of the premises mortgaged, to the mortgagee or some person in trust for him. Harding and his wife do not release their right in the mortgaged premises, but agree to convey their moiety in the same way, 22 February, 1713. And the mortgagee agrees, that, in consideration of 500*l.* paid *per* Harding, he or his trustee shall convey to Harding, his heirs, executors, and administrators, as he should appoint, the mill and closes, with

Conveyances accordingly.

Mary releases her moiety of equity of redemption to the mortgagee.
Harding *et ux.* agree to do the same.
Mortgagee agrees to convey part to Harding.

(c) This must have been made by fine, though no fine is stated: therefore it must be implied, that there was a fine; and what follows shews it.

the appurtenances, and the inheritance thereof. *17 February, 1715, Harding and his wife performed their part of the agreement, by conveying a moiety of the mortgaged premises, in trust for Chandler and his heirs. But the mortgagee does not convey the term and inheritance of the mill and two closes to *Harding and his wife and the heirs of the survivor* (d). But there was a special covenant, that till a conveyance should be executed, he was to *stand seised to the same uses*: and Harding and his wife continued in possession of the premises.

11 January, 1718, There being no issue male of the marriage, an indenture was made, between Harding and his wife of the one part, and Sir Francis Page and Robert Simmons of the other part; reciting the settlement, 16th August, 1695, and covenanting to levy a fine, to assure the premises to the use of the daughters of the marriage, as tenants in common; and in default of such issue, to Page and Simmons, and their heirs, in trust for the said Elizabeth Harding, her heirs and assigns, to the intent, that she might at any time during her life, without her husband's concurrence, dispose of the reversion of the moiety aforesaid, to such uses as she should, by her will or other writing, appoint, and for no other use, intent, or purpose whatsoever (e). A fine was accordingly levied. There was in fact no daughter of the marriage; but the wife survived the husband, and died without making any appointment, and without heirs on the part of the father, from whence the land descended. But Burgess, the plaintiff in the original cause, was her heir, on the part of the mother.

(d) By indenture, bearing date the 26th and 27th of February, 1713, N. Harding, and E. his wife, conveyed their moiety of the said mortgaged premises to the trustees and their heirs, in trust for the mortgagee, James Chandler (son of John Chandler), and his heirs, who, with the personal representative of John Chandler, covenanted that they would at any time thereafter, at the request and charges of the said N. H. and E. his wife, assign and convey the said several terms, and the inheritance of the said mill, &c. to the said N. H. and E. his wife, or the survivor of them, and the heirs and assigns of such survivor. No assignment was ever made, nor did the trustees make any conveyance of the inheritance; 1 Eden, 180.—“No alteration was made by the settlement of 1695, except giving Harding an estate for life, because the last limitation to the right heirs of E. H. was her old estate;” *MS. Serj. HILL*.

(e) “The rule of law was, as to the estates in this deed, determined, according to Clarke’s argument, in *Abbot v. Burton*, all the reports of which are cited in 14 Vin. Abr. 389, pl. 6 [Salk. 590, 11 Mod. 181, 1 Com. R. 160,] and long before in 2 Roll. Abr. [Uses, (D)], or 22 Vin. Abr. Uses (D), pl. 4; and even as to an equitable estate also; *Id.* pl. 2, 7. The estate by this deed was therefore to go to the paternal heir,

except as to the mill and closes, without alteration of the course of descent, and there was no need of any argument; and it is strange that Lord *Hardwicke* should have sent it to B. R., and still more so, that it should have been so much argued in Chancery, after the cases of *Abbot v. Burton*, and *Godbolt v. Freestone* [3 Lev. 406], directly in point, and many other authorities founded on the like principles, Vin. Abr. Uses. Notwithstanding all which it appears, that the principle of the determination of this case, according to Clarke’s opinion, has been doubted. Add to these authorities, above referred to, that of Jenk. 220, which I apprehend is clearly right, that the course of lands cannot be altered, but by act of Parliament: and that it is also clear, that the heir, taking either by express limitation, or for want of a limitation or disposition from him of a reversion after particular estates, which is called by some a resulting use, takes by descent, and not by purchase: though if the heir had taken by purchase, *i. e.* by description under a devise in a will to the testator’s heir;—at common law;—or even in a deed of uses, perhaps it might have been otherwise: 2 Vern. 733.”—*MS. Serjeant HILL*.—See also *Allen v. Heber*, ante, 22, and the cases there referred to, n. (e); and *Harg. Co. Lit.* 12 a, *et seq.*

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Harding performs his part; but the covenant of the mortgagee still subsists. (Qu. did Harding appoint such conveyance?) (Qu. de coo.) Conveyance of Harding’s moiety to use of the daughters of the marriage. Remainder to trustees in trust, to attend the disposition of the wife.

Fine.

No daughter.

No appointment.

Wife dies after her husband, sans heir ex parte paterni.

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v.

WHEATE.

Trustee in pos-
session.
Bill.

Answer.

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Decree.

Case stated in
B. R.Questions and
Answers.

After the death of Elizabeth Harding, Sir Francis Page got into possession; and in July, 1739, this bill was filed against him by Burgess; and, he dying, it was revived against his personal and real representatives. Bill prayed, that if there was any legal interest in Sir F. Page, he should be compelled to convey to plaintiff, deliver up possession, and account for the rents and profits. Sir F. Page, by his answer, insisted, that he was

*lawfully seized of the inheritance of the estate, and entitled to the rents and profits.

On the 14 July, 1741, the cause came on to be heard, and went off, for want of parties. The Attorney-General was made a party, and the cause came on again before Lord *Hardwicke*, Chancellor, the 11 February, 1744, when a decree was made, that a case should be settled, and questions stated, for the opinion of the Judges in B. R. The case was argued there, and they have certified their opinions to the Lord Keeper.

Qu. 1. Whether by virtue of the indenture of the 11 January, 1718, and the fine therein mentioned, any and what estate in law, did pass to Page and Simmons, or either of them?

Ans. That by the indenture of the 11 January, 1718, and fine, the reversion in fee-simple after the death of Harding and his wife without issue male, did pass to Page and Simmons.

Qu. 2. In case no estate passed to Page and Simmons, or either of them, by virtue of that indenture and fine, Whether the inheritance of the premisses, or any part thereof, did, on the death of Elizabeth Harding, descend to Burgess, as heir at law, on the part of the mother?

Ans. In case no estate had passed to Page and Simmons, by virtue of the said indenture and fine; we are of opinion, that the inheritance of the premisses in question, or any part of them, would not, on the death of the said Elizabeth Harding, have descended to Burgess, as heir at law on the part of the mother.

Qu. 3. In case the said deed of the 11 January, 1718, had not been executed, or the fine levied, but the same were entirely out of the case; Whether the inheritance of the said premisses, or any part thereof, would have descended to the said Richard Burgess, as heir at law on the part of the mother?

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Ans. In case the deed of the 11 January, 1718, had not been executed, or the fine levied, but the same were entirely out of the question; We are of opinion, that, upon the death of Elizabeth Harding, the inheritance of the premisses, or any part thereof, would not have descended to Burgess, as heir at law on the part of the mother. But we are of opinion, that, if the mill, &c. had been conveyed to Nicholas Harding and Elizabeth, his wife, and the survivor of them, and the heirs of such survivor, according to the covenant in the release of the 22d February, 1713, they would have descended to the said Burgess, as heir at law on the part of the mother.

After this certificate was returned, the Attorney-General, on behalf of the Crown, filed an information; insisting that Sir F. Page, by the deed of 1718, had no beneficial interest in the estate in his own right, but was a mere trustee for the benefit of Mrs. Harding, or her appointee or heir; and in default of such appointment or heir, that he was a trustee for the benefit of his Majesty, who stands in the place of such heir; and that the premisses were escheated; and that the representatives of Sir F. Page ought to convey to the use of his Majesty. To this there is an answer put in, and issue joined; and the information is now at hearing, and the original cause is now set down for farther directions. This is the state of the case, of the cause, and of the several claims of the parties.

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v.
WHEATE.
Information by
the Attorney-
General,
On behalf of the
Crown.

Answer and
issue.

I shall now proceed to consider these claims in order.

First, the claim of the plaintiff, Burgess, as heir at law, *ex parte maternd*, in default of an heir *ex parte paternd*.—This claim I see no ground for, considering the certificate of the Judges, which Lord Keeper proposes to confirm. The questions stated for B. R. have left the point open to the maternal heir, if there was any ground of right; and *their answers have effectually precluded him, in case he has no equity. And what ground of equity has he? What has been insisted on is mere matter of law, and would open the questions again which are concluded. For, by the deed of 1718, 'tis held he took nothing;—that the trustee thereby took the legal estate, and no new use was created by Mrs. Harding. The only thing suggested by that side, that has the colour of equity, is,—That Mrs. Harding might have prayed and compelled a conveyance from the trustee, while she lived, by which she would have been seised to new uses; which, in default of heirs *ex parte paternd*, would have gone to the heirs on the part of the mother: and, that it is a rule in equity, "That what ought to be done, or is agreed to be done, is looked upon as done." Had such a conveyance been executed, it would have been like a feoffment and re-feoffment, and have made her seised of a new use(f); but as it was not done, the consequence insisted on

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(f) "A fine, with grant and render, is by some authorities said to be tantamount to a feoffment and re-feoffment; 14 Vin. Abr. 288, pl. 5: but the principal case there is *contra*; but all the authorities are agreed as to a feoffment and re-feoffment: 5 T. B. 105 [*Roe v. Baidewers*]; and note, that it does change the descendible quality. On the other hand, all the latter authorities are, that a fine, if it be not *sur grant et render*, will not change the descendible quality, and that there is no difference, whether the use result or be expressly declared. Hob. 31 [*Cowden v. Clarke*], to the contrary, is denied in 2 P. Wms. 188, 189 [*Harris v. Bishop of Lincoln*]. Yet though there is a fine and uses declared to make a tenant to the *præcipe*, and a reco-

very against the tenant, to which the tenant in tail comes in as vouches, the course of descent will not be altered by the express declaration of the uses to the tenant in tail and his heirs; Salk. 590 [*Abbot v. Burton*]; 18 Vin. Abr. 374, pl. 11."—*M.S. Serj. HILL*.—That a fine *sur done, grant et render* alters the descent, see *Pries v. Langford*, 1 Show. 92, 1 Salk. 337, Carth. 140, Holt, 263. If a tenant in tail by purchase under a marriage settlement made by his maternal ancestor, with the reversion in fee by descent *ex parte maternd*, suffers a common recovery to the use of himself in fee, the estate will descend to his heirs *ex parte paternd*; because the fee acquired by the recovery will descend in the same manner as the

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[Therefore the case is defectively stated in this point.]

will not follow; for nothing is looked upon in equity as done, but what *ought* to have been done; not what *might* have been done. Nor will equity consider things in that light in favour of every body; but only of those, who had a right to pray it might be done. The rule is, that it shall either be between the parties who stipulate what is to be done, or those who stand in their place. Here Mrs. Harding never prayed a conveyance, and one cannot tell whether she ever would; and the maternal heir is not to be considered as a privy in blood, but a mere stranger. This very cause warrants the distinction here taken; *i. e.* with regard to the mill, &c. mentioned in the opinion on the last question. It stands thus: Nicholas Harding, after having agreed to release to Chandler the equity of redemption of a moiety in the mortgaged premises, agrees to purchase of Chandler the mill, &c. and makes Chandler stipulate to convey these premises to him and his heirs, or such person as he should direct. The equity of redemption was released, and then *Chandler stipulates to convey to Harding and his wife, and the survivor of them, and the heir of the survivor. The consequence is, that Mrs. Harding takes this estate, not as the old use, but by purchase under the appointment of her husband; which enlarges the course of descent beyond that of the old use. And since what is covenanted to be done is considered as done, the mill goes in a course of descent (in default of paternal heirs) to the heir *ex parte materna*. In the deed of 1718, there is nothing like such a covenant, nor any thing which shews, she intended to enlarge the course of descent. Wherefore, under these circumstances, as the opinion of the Judges is proposed to be confirmed, I think there is no ground for the claim of the maternal heir.

Secondly, The next claim is on behalf of the Crown; to which there are two preliminary objections.

1st. That the claim of the Crown is premature; there being no office found, or inquisition taken, to find a title in the Crown. There are cases where such previous step is necessary: where the Crown wants to make a seizure, and to take possession of the freehold and inheritance; there its title must appear by matter of record, whether judicial or ministerial, or whether the conveyance itself be matter of record, or matter of fact founded on record.—This is the constant barrier between the Crown and the subject; and the effect of it is, to put the subject on interpleading with the Crown, by traversing its title or setting up a better, in a *monstrans de droit*, or petition of right. The judgment, if the subject succeeds, is *amoveat manus*; but he loses the intermediate profits, which are accounted for in the Exchequer; 4 Co. 55. *Baxter's Case*, 75. Finch. 325.—It is the prerogative of the Crown not to interplead with the subject before they take possession.—But it is

estate tail acquired by purchase from the maternal ancestor; that is, to his paternal heirs; *Martin v. Strachan*, 5 T. R. 107, n.

ante, 22, n. (e): see also *Goodright v. Wells*, 2 Doug. 771; *Dos v. Morgan*, 7 T. R. 103.

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said, may not the Crown, where it has a legal title, in lenity to the subject, waive that prerogative, and interplead with the subject, as one subject may with another?—"Tis clear the Crown may. The office is circuitous, expensive, and attended with the loss of mesne profits to the subject. The Crown may refuse to alter the possession, till the right is determined, and *only proceed by information of intrusion; even where they have a legal right, on an office, which may warrant a seizure. But the present case is stronger; for if a finding for the Crown had been, under office and inquisition, it must have been fruitless, ineffectual, and *felo de se*. It must have found all the matters aforesaid: Mrs. Harding's seisin; conveyance to, and the legal title in, Page;—and an inquisition will not entitle the Crown to seize, where there is a legal title in possession in another. The Crown might have recourse to equity, if the Crown has any equity. It was said, there might be a finding for the Crown, on an equitable title; *Holland's Case*, Aleyn 14. But then it was answered, this was a copyhold, and the Crown could not hold of a mesne lord. It is true, that in fact an office was found; but an *amoveas manus* was awarded, not on the merits of the case or the exceptions there taken to the *venire*, but an objection was taken by the Court itself to the commission, that there was no direction for seizing. This was an objection taken probably on a foresight, that as to the merits of the case, they could not succeed. Lord *Hale* was of council for the Crown in *Holland's Case*; and he, in *Sandy's Case*, Hardr. 488, shews, that the only proper remedy for the Crown to pursue was by bill in equity. He says, the King could not have entered in point of law, and a *bill* of intrusion did not lie; and the only proper remedy was in equity. It is properly said, that the estates being copyhold might be a reason, why the equitable remedy was not pursued. This case is rather an authority, to justify the remedy now pursued by the Crown, than one to found an objection on. Therefore the objection for want of office is groundless; and a bill or information is the only proper remedy (g).

Objection 2. This is not the proper Court for the Crown to institute a suit in; but it should have been a Court of Revenue. This is a strange objection to be made in any case. And, as the circumstances are, it is still stranger to be made in this;

(g) "Where the King's tenant is in possession, and dies without heir, the King hath not only a legal seisin, as in the like case subjects have; but he hath an actual seisin. Therefore if any enter, and take the profits, though no office be found; yet an information of intrusion may be preferred against him, who entered; but when another is in seisin and possession at the time of the escheat, as if the king's tenant is disseised and dies without heir, or if an alien born, or the alienee in mortmain is disseised, and all this is found by office; in these cases the King shall not be in possession, till the possession and seisin of the

terre-tenant is removed; 4 Rep. 58 a, *Comminality of Sadlers*. In the present case, the heir of the surviving trustee was in seisin and possession, and therefore the want of an office found would have been a good objection, if the Crown's title had been legal. For wherever an office is necessary to vest the estate in the Crown, as in the case of a purchase by an alien, there there must be an office found, before the title of the Crown can be determined; *Parker*, 152, 153, 161, 162 [*A. G. v. Duplessis*]." *M.S. Serj. HILL*.—See also *Reese v. A. G.* 2 Atk. 223; 16 Vin. Abr: *Office* (D) pl. 15; *Com. Dig. Prærog.* (D 70).

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because, though the Crown may insist on being sued in its own pro*per Court, yet it may sue in what Court it pleases: Finch, 84 (A). It may bring a *quare impedit* or writ of escheat in B. R.; it may have a *quare impedit* in B. R., though there has been a recovery in C. B. But it is yet more extraordinary in this case, as the Crown might have made the objection; and yet waived it, and filed its information in the same Court, where the cause was instituted; otherwise, all the proceedings in the original cause had been fruitless, and the Crown might have then gone into [the] Exchequer: in return for which indulgence, this objection is now made. But if any one else could have made the objection, Burgess cannot; for he brought the Crown here first, and so is estopped. In Sir John Warden's Case before Lord Talbot, there was an objection for want of jurisdiction here, and that the matter was properly triable at law. But it being disclosed, that he had filed a cross bill, the Court did not enter into that objection; but said, the defendant had *given* a jurisdiction. This brings me to consider the merits of the claim of the Crown.

The great question is, whether the Crown has a right to a conveyance of the legal estate from Mrs. Harding's trustee, as an equitable escheat, by the death of Mrs. Harding without heirs on the part of the father, from whom the estate descended to her.

I shall consider the right of escheat, in three lights.

First, In what situation it stood in respect to conveyance at common law, before the invention of uses.

Secondly, In what situation it stood with respect to conveyance to uses, before the statute of uses was made.

Thirdly, How it stands since that statute, and now, with regard to trusts.

The result and application of the whole will decide the question, how far the Crown is, or is not, in equity entitled to a conveyance, from a trustee or those in his place. *In treating these points, one might expatiate into a curious field of learning, from the writers on allodial and feudal property; but as the doctrine of tenures was never wholly adopted into our constitution, the different periods of our laws cannot be accounted for from a strict notion of *fiefs*. So that it would be perplexing the case to go into the general learning. I shall therefore only have recourse to it occasionally, so far as I find, by our own writers, it is now adopted into our constitution. In other respects, that law is of no more use than the Roman law. It serves for ornament and illustration.

1. Consider how escheats stood at common law, before uses were invented. An escheat was, in its nature, *feudal*. A feud

(A) "Vide Cecil's Ca. in Exchequer, 7 Rep. 18 b, where Cecil filed a bill in the Exc. Chamb. for relief against a bond to the Queen, for which process was sued out of the Exch., and his bill was founded on stat. 33 H. 8, c. 39, s. 79. The Court was of opinion to relieve him; but the

A. G. perceiving the opinion of the Court, *ulteriorius processui non vult*; Ibid. 30 a. It is not mentioned, who was the defendant; but it seems it must have been the A. G. only, for the Queen could not." *M.S. Serj. HILL*. See 16 Vin. Abr. *Prærog.* (Z.); Com. Dig. *Id.* (D 85).

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was the right which a tenant had to enjoy lands, &c. rendering to the lord the duties and services reserved to him by contract. On the other hand, a right remained in the lord (after a grant made) called a seignory, consisting of services to be performed by the tenant, and a right to have the land returned, on the expiration of the grant, as a reversion: a right afterwards called an escheat. And as the grant was more or less extensive, the reversion was more or less remote: for the feuds were sometimes temporary, sometimes hereditary; and a temporary one ended on the grantee's death. Sir Henry Spelman takes notice only of hereditary feuds, nor do our own laws. And though it may seem a paradox to modern ears, a feoffment to A. and his heirs did not pass a fee-simple originally, in the sense we now use it; but only an estate to be enjoyed as a *metum beneficium*, without power of alienation, in prejudice of the heir or the lord. And the heirs took it successively as an usufructuary interest; and in default of heirs, the land escheated or *reverted* strictly speaking. If there was an heir, and by legal impediment he could not take; the land *escheated*. Bracton fo. 23 a; 46 Edw. 3, pl. 4; Bro. Escheat, pl. 2. In short the *reverter* took place, when the grant expired naturally, and the heirs failed in length of time. In case of **escheat*, it was cut off by civil law impediment, and was an accidental determination of it. The heir took by purchase, and independent of the ancestor. He could not alien: nor could the lord alien the seignory, without the consent of the tenant. Afterwards the right of the lord gradually underwent several variations; which tended to diminish the interest of the heir and the lord, and to increase that of the tenant: so is Spelman, c. 1. The first variation was, when the power of alienation, with leave of the lord, was introduced, then the heir no longer took independent of the ancestor; but, what the ancestor pleased to leave him, and by *descent* from him. In Bracton's time, a doubt arose how the heir took. Some thought he was co-infeoffed with the ancestor, and that he took by purchase from the donor. Others held (which opinion prevailed in Bracton's time) that he took by descent. This accounts for what is said in 2 Inst. 336, that a formedon in descender did not lie at common law of an estate-tail, because the issue took by descent: but though he lays down the law, he don't give the reason. Therefore, if the ancestor aliened, the heir was defeated; and the effect to the lord was only in the chance of the escheat, from the change of the tenant, *vis.* from grantee to alienee.

The next step in favour of the tenant was, to alien without licence; for which purpose, a larger grant was necessary, *i. e.* to him, his heirs, and *assigns*. This gave the standing right of alienations. Bracton, l. 2, c. 6, s. 1, fol. 17. So the tenant could alien and change the escheat, and the lord was obliged to warrant such alienee. The only restriction on the tenant was, that he could not prejudice the lord, by lessening the services reserved. Bract. fo. 23 b.

The next privilege to the tenant was, that he might alien,

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where the grant was only to him and his heirs. 2 Inst. 66, gives the reason, that such a tenant was not to be restrained from alienation. It was against the nature and purity of an estate infeoffed at common law. This was in effect only a right of alienation *sans* notice.

[*135] The next step effected the right of escheat; which was not only to alien, but to charge or incumber, the feud. And the lord *was to take it, subject to such incumbrance. Wright's Ten. 117; Spelm. 21, 23; Bract. 382, § 8. This power of incumbering was more prejudicial to the right of escheat, than the power of alienation was. That only changed the chance; but by the incumbrances, more or less, the escheat was in proportion defeated. However, it was still only subject to the acts of the tenant.

The lord's right was still farther affected by acts of Parliament and judicial determinations; which subjected the land, not only to acts of the tenant, but of the law on the tenant's account. Stat. Westm. 2, subjected the moiety of the tenant's land to *elegit*; statutes Merchant and Staple (13 Ed. 1, and 27 Ed. 3), affected the whole feud for the tenant's debt, even in the hands of the heir. Bro. Dower, pl. 64: It became also subject to the dower of the wife. The books have omitted the title of original reverter; but the escheat is said to be a compensation to the lord, for the loss of services: *Quia homagium et servitium amisit*. So is F. N. B. tit. Escheat, A. The right of reverter is quite omitted out of the definition.—This, before the invention of uses.

[*136] 2. How escheats stood after the introduction of uses, when the tenant might sever the legal from the beneficial interest. Then the two interests were considered as two distinct sorts of property, in different persons. The *cestuy que use* was no longer tenant at law, nor was the land liable to be subjected to his incumbrances, as dower, executions, &c. *Chudleigh's Case* (i). But though the land was not liable at law, on account of the *cestuy que use*, yet it was still liable on account of the feoffee to uses. Bro. Feoffment to Uses, pl. 10. Poph. (k). This defeated the creditors of *cestuy que use*, and was found inconvenient. Persons having actions against him were defeated. Tenancy in dower, and by curtesy, was gone; and therefore, several statutes in favour of creditors were made to restore all the claims against *cestuy que use*. Bacon, vol. 2, of Uses. Thus, 4 H. 7, 19 H. 7, c. 15, and others were made, to restore the fruits of tenure to the lord, against *cestuy que use*; *as wardship, heriot, relief. Yet, none were made to restore the loss of escheat; which, as Spelman observes, is not only the fruit of tenure, but the very tree itself.—Thus it was, till the making of statute of uses.

3. That statute united them, but they still continued under the name of trusts, as a divided interest. It was done by limit-

(i) 1 Rep. 120 a.

(k) P. 3, Earl of Bedford v. Russel; see also Hardr. 469; 2 Ves. Sen. 633-4.

ing the use to the feoffee, who was declared a trustee. There was one use which the statute did execute, and another which it did not. So trusts succeeded uses. *Aliusque et idem nascitur*. And as a use could not be on a use, it took the name of a trust; and, as the law would not meddle with a use on a use, equity therefore does. This brings me to consider the nature of *this* use, with respect to an escheat. It has been contended on the part of the Crown, that equity is to be considered as a thing of yesterday: That trusts were not come to any maturity, nor governed by any settled principles, even in 1718: That it was left to the judge in equity, whether to observe the rules of law, with respect to uses, or to depart from them: That, as to tenancy by curtesy and tenancy in dower, equity differed from itself. All this is to be considered; and part of it is a melancholy representation of a Court of equity. As to its pedigree, one may with pleasure observe, that equity is as old as Bracton, who, fo. 23 b, distinguishes how it would be *secundum æquitatem*, and how *secundum rigorem juris*. When once it existed, it must have its rules and principles, like other artificial systems. It was not a perfect system. New cases begat new, but not contradictory rules to the old ones. When once a trust became the object of equity, the same governing principles were observed in trusts, as before in uses. The analogy, as to the outlines of each, is apparent. Bacon, Law of Uses, 57. Uses took place from a reasonable cause, to give men power to dispose of their own: So did trusts from the convenience of families. This, the only motive that made mankind endure *uses and trusts; Bacon, 80. A conveyance with consideration without notice bars a trust; so it did an use; 2 Roll. Rep. But it is not barred in trustee's hands, or in the hands of purchasers with notice, or without consideration. As to the construction of trusts, the intention of a person creating a trust chiefly governs, where not against good policy in its construction; Hardr. 404; Bacon, 79. So it was as to uses—trusts and uses not only agree in these particulars, but in the different construction of deeds in law and equity. At law the legal operation controls the intent, but in equity the intent controls the legal operation of the deed. It is not sufficient to single out a few instances and exceptions, which no rule is without, and which besides, in this case, I think are sufficiently accounted for otherwise. But it is said, the rule of uses was narrow and inconvenient, and that equity adapts to trusts, not so much the rule of uses, as the consequences of law:—That trusts are alienable, will descend *ab intestato*, and be liable to, and capable of, the same limitations and successions; are valid and void on the same principles (except the case of dower, which proves the rule); and that in tenancy by curtesy, equity agrees with the system of law.

These are objections all founded on one principle. The analogy must be confined, both in uses and trusts, to those cases, where they are considered as distinct from the legal

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estate. In other cases, both uses and trusts will fall within the rules of law. This is reasonable, because there is no necessity of departing from them. It is said they are both alienable by like conveyances, &c. But this don't prove equity in construction of trusts to go by a different rule from the law in construction of uses; for uses went by this rule, and equity would not vary from the law unnecessarily. Anderson says, in *Chudleigh's Case* (Bacon, 78), there may be a *possessio fratris* of an use (k). It is no more than saying, the Chancellor held consultation with the rules of law, where [there was] no reason to go against them. The instances prove the agreement * between uses and trusts; they agree with the legal system. And the case of tenant by curtesy is an exception to this rule. Equity does allow a tenant by the curtesy of a trust contrary to the rules of law. Perkins 69, § 349; and 499, § 457 (l). But this instance of deviation is not to be argued upon to consequences. It seems to have prevailed unaccountably, and against the opinion of the Judges themselves. It seems to have taken its rise in Lord *Somers's* time, Pr. Chanc. 67; in *Snell* against *Clay*, 2 Vern. 324, tenancy *per* curtesy was allowed of a trust, though there was an outstanding term. *Brown* against *Gibbs*, 97 (m). In *Banks* against *Sutton*, 2 Wms. (n), Sir *Joseph Jekyll* makes an observation on Lord *Somers* avoiding the authority of his own determination, and that he intimated a disapprobation of his own distinction between a use and a trust. *Sweetapple* against *Bindon*, 2 Vern. 536, was the next. Taken for granted, there should be no tenancy *per* curtesy or in dower of a trust. It is true Lord Keeper *Wright* held otherwise, and allowed a tenancy *per* curtesy of money to be laid out in lands. I think this precedent don't seem fit to be allowed; because the will, on which that determination was, admitted a doubt, whether the wife was tenant in tail. It is mentioned in Pr. Ch. 536. This has a correlate to the time of her dying, the brothers and sisters then living. In *Banks* against *Sutton*, Sir *Joseph Jekyll* don't approve any where of *Sweetapple* against *Bindon*. And though he held the wife dowable there of an equitable estate, yet he did it on particular reasons; because it was a trust created by the ancestor of the husband, and not the husband himself. This is too precarious reasoning to go upon. The husband found the estate subject to the trust created by the ancestor. Who can say that he intended the wife not to be dowable? Who can say that, if he had not found the estate under a trust, he might not have created such a trust? The next endeavour was to bring the husband down to a par with the wife. But this was denied in *Chaplin* against

(k) Mr. Eden observes, that this is a mistake; "that *Anderson, C. J.*, did truly and profoundly contest the vulgar opinion, that there might be a *possessio fratris* of a use;" Bac. on Uses, 11.

(l) *Watts v. Ball*, 1 P. Wms. 108;

Hearle v. Greenbank, 1 Ves. Sen. 298; 3 Atk. 695, 716; Harg. Co. Lit. 29 a, [n. 165].

(m) Pr. Chanc.

(n) P. 700; see also *Forder v. Wade*, 4 Bro. C. C. 521; Harg. Co. Lit. 31 b.

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Horner (o); *Attorney-General against Scot (p)*, and in *Goodwin against Winsmore (q)*, per Lord Hardwicke, 1742-3. *Casborn against Ingkis (r)*; husband denied to be tenant *per curtesy*, by Sir J. Jekyll, but that was reversed. It is, I own, almost a reproach to a Court of equity; but shall not equity therefore follow the rule of uses? shall it make another rule deviating from that? I think that there ought to be a conformity in trusts and uses, and that this case of tenancy *per curtesy*, which is different, ought to be the only one, and that there the bounds are fixed: Hardr. 494; *Attorney-General against Scot*; Lord *Coventry's Case*. Equity, in determining trusts, has observed the rules of law touching uses, unless there was a reason to the contrary: And the instance of tenant *per curtesy* does not furnish any reason.

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Having considered the right of escheat, and how affected at common law by conveyances to uses—and since upon trusts; I shall now apply the rules and principles collected from the foregoing considerations to the case in question, and see what conclusion arises from thence, and how far the conclusion I shall draw is warranted by law and reason. And under this head I will consider what arguments have been urged against it. Suppose Mrs. Harding, feoffee at common law of a trust estate, had aliened to Sir F. Page, she would have substituted him [as] an alienee instead of herself for services and escheat. If an escheat had fallen, which depended not on her delinquency, would the lord have been entitled? This is clear. Suppose Mrs. Harding attainted of treason or felony, the lord would not have been entitled. But the Crown says, she had reserved to herself the equitable interest. It will be necessary then to consider how the Crown would be affected by a use, supposing it had been a feoffment to use made to Sir F. Page. Would the lord's condition with respect to an escheat have been bettered by such a conveyance at common law? I think, it would have been worse. He would not have been entitled to an escheat on Mrs. Harding's felony. 5 Ed. 4, pl. 18, fo. 7 b; Authority in point against the lord's claim, and questions who should have it. If the lord is at law entitled to escheat, on death without heirs, or attainder of feoffee to uses, and not on death, &c. of *cestuy que use*, it strengthens the authority of the case; that if it had been determined otherwise, in favour of the lord, it would have given him a double chance for his escheat. * Brooke pl. 34, agrees the lord shall not have it, nor the heir (by reason of corruption of blood) and that feoffee shall retain it to his own use. And though this is introduced by an *ideo videtur* in a modest manner, yet many of his opinions are so introduced, and have generally been thought of very great authority. Lord Bacon, 79, confirms it; for, he

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(o) 3 P. Wms. 229.

(p) Forest. 138.

(q) 2 Atk. 525.

(r) 1 Atk. 603, 7 Vin. Abr. *Curtesy*, (E) pl. 23, very fully reported. It was

the case of an equity of redemption; and Lord Hardwicke decreed the husband to be tenant by curtesy of it, overruling the decision of Sir J. Jekyll.

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says, the lord shall not have it, because he has a tenant by title: and then differs from Brooke, who gives it to the feoffee for his own use, and says feoffee shall retain it either *in pios usus*, or the will of the feoffor. This seems to arise from an old notion, that a man's estate should be disposed of *in pios usus* (when there was no owner) in like manner as the ordinary used to take an intestate's effects *pro salute animæ*. But Brooke's notion is not so strange, even by Lord Bacon's own account. From these authorities it is clear, that if Mrs. Harding had been *cestuy que use* and attainted, the lord would not have been entitled to the escheat. How then does the case stand as a trust? It is clear that the Crown at law is not entitled in case of a use; then if trusts in equity are analogous to uses at law, (and I think they are) neither will the Crown be entitled in case of a trust in equity. Yet the question will not depend merely on that analogy, but on other arguments and authorities in point.

Sir *George Sandy's Case(s)* is in point, and that and the 5 Ed. 4. mutually strengthen each other. Freeman is rather more accurate than Hardres. As Lord Hale had an analytical head, it will give a clearer idea of the strength of his argument, to give an analysis of it. He first states several cases where trusts are forfeited, as for treason, by statute;—for alienage, by prerogative; for a debt to the Crown, partly by statute, partly by prerogative, and partly by *cursus scaccarii*, or the course of revenue. Then he distinguishes these cases from an escheat, as founded on a different ground, for want of tenant. Then he goes to a term; and gives reasons why a trust of a term cannot be forfeited. Then comes to his conclusion; if not a chattel, then not forfeitable; if a chattel, Freeman never had it to forfeit. I think this good sense, as well as good law.

[*141] *As to the inheritance, the lord is entitled to services, while tenant has the land; when no tenant to perform the one, or hold the other, the lord shall have it. Here is a tenant *de jure* to perform them; and so no forfeiture. *Trinity College against Brown*, 1 Vern. 441, goes on the same principle; the legal tenant [was] then living, therefore the best beast of *cestuy que trust* not liable.

Some objections were made to *Sandy's Case*. It was said to be a compassionate case. Much may be said of the charity of Lord Hale. He was obliged to mention the relations of the person murdered. But I meet with it only once; so far is he from including any thing to conciliate the passions of mankind, as an ingredient to his determination. 'Twas said he was a young judge.—He had at that time a great deal of experience, and his abilities were very great. I have seen determinations of the commissioners, during the *interregnum*, that do him great honour. The Case of Sir *George Sandys* was depending a

(s) Hardr. 488, 2 Freem. 129, 1 Sid. 403, 1 Hale H. P. C. 249; cited also in *A. G. v. Duplessis, Parker*, 156.

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great many years;—argued by very great men: P. 17 Car. 2, & M. 20 Car. 2; and this adds great weight to the authority. 21 Car. 2, *Hale* and *Trevor* gave their opinions. It is said, that only two judges gave opinions;—but no one can suppose that there were but two judges during four years in that Court. If they differed, *Hale* would never have given his opinion without mentioning it. In his Pleas of the Crown^(t), he says that it was *undâ voce* resolved, so no doubt but all the judges of the Court concurred. It plainly appears it underwent his serious consideration on second thoughts, by the manner he ranges his argument, in his Pleas of the Crown, different from what he did before. 'Tis said, *Hale* goes on wrong principles; for right of escheat is not founded on want of a *tenant* but of an *heir*, and as an heir was wanting, the estate should have escheated. But I think escheat not founded on want of *heir*, but of *tenant* to perform the services. Fitzherbert^(v), who is most accurate, expressly puts it upon that footing. Some books may use the expression, "for want of *heirs*:" but I believe its promiscuous use is owing to this, that before power of alienation want of tenant and heir was the same thing, *for at the death of the ancestor none but the heir could be tenant. Another objection is, that *Hale* supposes the land subject to trust will, on the trustee's attainder, or death *sans* heir, escheat to the Crown discharged of the trust: whereas in equity it will be liable to the trust. And so said, if the lord takes the estate subject to the trust, he ought to have, in return, a reciprocal benefit on the death of *cestuy que trust* without heir. I think this position and inference not warranted by any judicial determination. *Paulett* against *Attorney-General*^(u) and *Carter* 67^(w), and Pr. Ch. 200^(x), are cited to support it. The first, I shall consider by and by; the others are mere dictums of judges, collateral and foreign to the matter in question. In *Carter* 67, the question was, who should be considered as occupants. As to what *Bridgman* says in *Geary* against *Bearcroft*, the whole must be taken together. The other three judges had urged the argument *ab inconvenienti*, and *Bridgman* answers them. They said, a man conveys lands to trustees, and they commit felony, his lands shall be forfeited, though he may have relief in equity. *Bridgman* says, though equity may relieve, yet we must not take prejudice from equity against arguments at law. The equitable part is not the opinion of Lord *Bridgman*, 'tis only anticipating an equitable objection that might be made against it. Whoever looks into *Geary* against *Bearcroft* will, nine out of ten, be of opinion with the three judges against *Bridgman*. Now if he was mistaken in his legal point, more likely he should in equity, being recently brought into that Court from being a chamber conveyancer; and on a writ of error in B. R. brought on *Bridgman's* opinion, the Court affirmed the judgment of the three. As to

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(t) Vol. i. p. 250.

(v) F. N. B. 337, 4to ed.

(u) Hardr. 465.

(w) *Geary v. Bearcroft*.

(x) *Eales v. England*: see 2 Fonbl. Eq. 170, n. (5th ed.)

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Pr. Chan. 200, *Eales* against *England*, the same expression is not in *Vernon* (y), and this was a very extraordinary medium of proof, of which no precedent had ever been before him; 'tis proving *incertum per æque incertum*, if not *multo incertius*. Both the sayings of *Bridgman* aforesaid, and of *Trevor* here, have not the least relation to the matter in question. In this *last case, the question arose, upon the death of a trustee for 300*l.* in the life of the testator, whether the 300*l.* legacy was lapsed. Lord *Trevor* might have used many more similar and certain instances. *Pitt* against *Pelham* (x) must have occurred to him, where held, that death of trustee would make no alteration in respect of the beneficial interest. Instances where trustees for payment of legacies have died in testator's life, the estate has descended to their heirs, and been considered as a trust; and many much more similar:—None more difficult to prove; and had he been called upon to prove his medium, I believe he could not have done it. On the contrary, I believe, on the death of feoffee to uses (*sans* heir) the books say the lord shall take the fruits. This accidental accruer of a benefit comes in lieu of another benefit, and *cestuy que trust* seems no more relievable in this case, than on a sale without notice by the trustee. I think the contrary notion has been introduced by considering an escheat on the foot of a forfeiture. But they differ materially not only in the manner of the Crown's taking, but in respect of the consequences. The Crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting (a). The Crown holds in this case as a royal trustee, (for a forfeiture itself is sometimes called a royal escheat), but in general I apprehend an escheat is taken free from any equitable claim. If a forfeiture is regranted by the King, the grantee is a tenant *in capite* and all mesne tenure is extinct. If land escheated be regranted, he shall hold in honour. Therefore the position, that the lord takes the escheat subject to the trust, seems not warranted; though 'tis not necessary, I think, to give an opinion upon it (b).

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But supposing the position alleged to be true; why ought the lord to have a reciprocal equity on the death of *cestuy que trust* without heirs? What was cited out of Lord Nottingham was the argument of council, who throughout confound forfeitures and escheats, and speak of attainders in general without distinguishing, whether of felony, which would create an escheat; or of treason, which would create a forfeiture. It has been said, the King may be subject when in the *post*, as *when mortgagee is attainted, and shall have equity of redemption, when mortgagor is attainted, for the trust charges the land, when *non egreditur personâ*; Sir *Salathiel Lovel's* Case, Salk.

(y) *S. C.* 2 Vern. 466.

(z) 1 Ch. Ca. 177, 1 Ch. R. 283.

(a) *Duke of Bedford v. Coke*, 2 Ves. Sen. 116.

(b) By 39 & 40 Geo. 3, c. 88, s. 12, the King is empowered to direct the execution of any trusts or purposes, to which

any escheated manors, &c. shall have been liable at the time of their escheat, and to make grants to trustees for the execution of such trusts: by which it appears, that it was thought, that the Crown had not that power without the interference of the Legislature.

85, where there was a saving of blood, it was contended for—feiture did not take place; but held that in treason it would, though in case of escheat it would not. 'Tis not every argument in law or logic that holds *e converso*. It fails here, that the lord has as good a right as the other had against the lord. On a conveyance of land at common law, if tenant contracted a debt, and the land was extended, the lord took it subject to the debt: But did that give the lord any other right upon that account? The lord in the one case may lose; therefore in his turn, 'tis said, he ought to gain. But there should be a reciprocal right to have a reciprocal equity, and this would be allowing a reciprocal equity without a reciprocal right. Therefore I think the inference drawn is not warranted by the cases.

Several cases have been mentioned to encounter *Sandy's Case*. *Attorney-General against Holland* (in Aleyn, 14, &c.) was cited to shew the King shall have the benefit of a trust, as well as of a legal estate. That was not determined upon the merits; but Aleyn, 14, and also Stiles (c), suppose a trust for an alien did go to the Crown;—that the Crown takes by prerogative: At common law, if an alien purchased and took a conveyance, he took it for the benefit of the Crown, by prerogative. After uses invented, 'twas necessary to settle where the use should go, purchased for the benefit of an alien. Therefore stat. 3 R. 2, c. 5, and 7 R. 2, were made to enforce the common law prerogative, which else had been evaded by the introduction of uses. The ground of it was originally a common law right; and if a trust had been created, the King would have been entitled to the trust the same as to the land. But does it hold therefore that a trustee takes for the Crown on death of *cestuy que trust*? The difference between taking by prerogative and escheat is material, and Lord Hale makes the distinction.

As to *Pawlett* against *Attorney-General* (d)—It never came on upon the merits. It was a demurrer only to a bill brought by *mortgagor. The mortgage was made to Edmund Ludlow's father, and descended from him to Edmund the secretary, and in consequence of his attainder, was seised to the use of the Crown. The executors of the father were entitled to the mortgage money, and they put in suit a recognizance entered into as a collateral security for paying the money. The Crown seized the lands, and mortgagor filed a bill, and made the *Attorney-General* and Ludlow parties. The *Attorney* demurred; said the remedy taken was improper, it should have been by petition of *grace and favour*, as they call it, but meant of *right*. Hale said, equity of redemption lay against the Crown, but as to the remedy or manner of suing, that was a matter of high nature; but he held the executor, and not the heir, entitled to the mortgage money. These are the circumstances of the case. What says Lord Hale, in *Pawlett's Case*?

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That though by the attainder of treason, the estate was forfeited, yet it was liable to redemption in the hands of the Crown. What does he hold in *Sandy's Case*? that a trust estate did not escheat on the attainder of *cestuy que trust* for felony. The consequence is, that if the trustee is attainted, for felony, or die *sans* heir, the estate would escheat to the Crown.

There is a distinction between the cases, a double difference between this and *Sandy's Case*. One is escheat for felony, the other forfeiture for treason: The one a trust only, the other an equity of redemption. The distinction between an escheat and a forfeiture can't be disputed. The other distinction between a mere trust and an equity of redemption is rationally taken, by Hale, in *Pawlett's Case*, Hardr. 467. I conceive a mortgage is not a mere trust, but a title in equity.—Id. 469, he says, a trust is collateral to the land, and created by contract of the party; and therefore one that comes in *en le post* shall not be liable to it: But the power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise. In this Lord Hale is not singular; Lord Nottingham (MS.) says, an equity of redemption charges the land, not a trust; therefore, though for this particular purpose (as to allowing husband to be tenant *per curtesy*) there is no difference between a trust and an equity of redemption; yet it does not follow that they run *quatuor pedibus*. *It hath been hinted, that Lord Nottingham seemed to think it deserved further consideration. But I think he rather approves the case. His words are (MS.), "In Sir *George Sandy's Case* (whose son being *cestuy que trust* of a term, and attainted of felony) 'twas resolved that the term was not forfeited, because inheritance not forfeited. *Unde sequitur*, where inheritance is forfeited, term is forfeited. I therefore think Sir *George Sandy's Case* is unimpeached."

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But then 'tis endeavoured to bring the lord within the trusts of the deed of 1718. There's no trust expressed or declared for him. Is there any implied or resulting to him? The trust of the legal estate can only be co-extensive with that legal estate. So that I think Mrs. Harding had not power to create a trust to give the lord a right after her heirs. Her interest ends where his begins. She could not create a trust, that could not be executed by a legal limitation. If there had been a limitation to the lord in default of her heirs, it would have been void, and the lord would have taken by his own title, which is paramount to that, and not by her title.

The intent is to prevail, it is said; could Mrs. Harding be supposed to have the lord in view? The legal estate may be extended to answer the purposes of the trust declared. There can be no trust, where there is not a legal estate created co-extensive with it; and a trust can't be executed, where no intent appears to create it, save by operation of law; and a trust can't result by operation of law, but for those for whom the trust might have been declared by the party creating the trust. The deed

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expresses no trust for the lord, therefore the Court can't execute one. But 'tis said, the limitation to trustees is in trust for her and her heirs, and subject to her appointment: She making none, the lord is to be considered as heir or appointee. That before the power of alienation, the lord had a strict reversion; but since 'tis become a kind of heirship or assignment. *This is inverting the law itself; for he claims in the *post*, not in the *per*(e): it makes the lord hold of the tenant, not the tenant of the lord. Can the power of alienation give the lord a greater power than he had before? Before the power of alienation, tenant or heir took by purchase, as a mere usufructuary, and the lord took what the ancestor left. Before, as well as after the power, the lord and tenant had the whole interest, and as the tenant's power over the feud increased, the lord's diminished. I admit the lord by escheat is called in some places *quasi hæres*, but 'tis always to his prejudice where he is so said to take, and never to his benefit. Bract. 23 a. *Item cum revertitur terra, non pro defectu hæredis, sed propter impedimentum perpetuum, habebitur loco hæredis ad warrantandum, &c.*: which shews, that before the power of alienation the tenant could not demise, but the lord was obliged to warrant to the lessee as much as the heir. Bro. Esch. 33, is a very obscure case, and not to be found in the Year-book. Where the Crown made a grant to A. for life, or to the heirs of his body, the King, on death of tenant for life, or in tail, shall be in without office, and whether he enters or not, as being heir of the person who died seised. So far is the lord from being entitled to a benefit as heir or assignee, that he is on the contrary excluded from privileges that the heir or assignee is entitled to (f). At common law only feoffor or his heirs could enter for breach of condition, grantee or assignee could not; therefore the stat. Henry 8 (g), was made to cure that defect, and give the grantee a right of entry, Co. Litt. 215 b; yet the lord could not claim that benefit under the statute. So that so far from the lord's taking benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law, and the assignee by statute. Yet 'tis said, the lord by escheat may distrain for rent reserved to A. and his heirs, Co. Litt. sect. 348, as in the place of heir, and so has privileges equal with the heir. I can't admit this right of distraining is a privilege; for his right of distraining is not as heir, but as incident to his *reversion; and the same book says, the lord can't enter, because he is not heir. And this answers another observation, that the lord may take the benefit of a term limited to the owner and his heirs; but the answer is, he don't take it *as heir*; but where he takes the inheritance as escheated, he takes the term as attendant upon, and following the fate of the inheritance; according to *Sandys' Case*, *Pawlett's Case*, and Lord *Jeffries's* determination.

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(e) See *post*, p. 179, n. (y).(f) See *Fairclain v. Earl Gower*, *post*, 357.(g) 32 H. 8, c. 34: see *Webb v. Russell*, 3 T. R. 393, *Vernon v. Smith*, 5 B. & A. 10.

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But if the lord is not within the reach of the deed of 1718, yet it is said, that this is but a mode of conveyance for a particular purpose, to give a *feme covert* a power to dispose of her estate if she pleased; and as it has never answered that purpose, 'tis to be considered as if it had never existed; and if so, then the estate would have escheated on her death *sans* heir. This is contrary to what the heirs on the part of the mother insisted on. The maternal heir is for having another deed, *i. e.* a supposed re-conveyance from the trustee to Mrs. Harding. The Court can do neither; but 'tis begging the question to say, that the deed of 1718 shall be laid out of the case. Voidable deeds shall not be laid out of the case, but shall bind the escheat; 2 Roll. R. 403; 7 Rep. 7 b. An infant's deed shall bind against the lord; and that in Rolle was a lease by the husband of the wife's land, without her joining. She died *sans* heir. Question, whether it should bind the lord's escheat; and it was held that it did. So for the purpose of binding the lord in escheat, deeds have been held good against him, that would have been void in other respects. The deed can't be laid out of the case. The effect of it is such, as legally to exclude the lord while there is a tenant.

[*149] If the escheat is legally gone, where is the equity to revive or restore it? Is it such a right as should induce the Court to go out of its way in its support? Escheats are become notional and positive, and the reason a good deal ceased, since the tenant's power of alienation, and the heir's becoming dependent on the ancestor; why should not a rent escheat as well as a trust? The first lies in tenure as well as the last. At least, why should not the lord have the rent in equity? Every *body knows the land shall be discharged of the rent, rather than the lord shall have it (A). The equity is as good in one case as in the other.

I admit most of our law as to its foundation is positive; the rules of descent are positive. The instances put from the feudal law deserve no favour, in preferring the uncle to the father as heir to the son, and preferring the lord by escheat rather than one of the half blood. If the uncle in the one case, and the lord in the other, has a legal right, equity will not take it away. But when any of these rights are gone at law, I think a Court of equity can't interpose to restore them.

Arguments are used *ab inconvenienti*. They say the consequences will be mischievous; as if one is convicted of felony, whose estate is in trustees, the *cestuy que trust* forfeits for felony and is restored by pardon (i): shall the trustee hold both against the Crown and the *cestuy que trust*? Whether he can keep it against the Crown is the case in question. But the

(A) If a man seised in fee of a fair, market, common, rent-charge, rent-seck, warren, corrody, or any other inheritance, that is not holden, and is attainted of felony, the King shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot

descend to the heir, nor can they escheat, because they be not holden; they perish and are extinct by act of law; 3 Inst. 21; Hardr. 496.

(i) See *Toomes v. Etherington*, 1 Wms. Saund. 361; 2 Hawk. P. C. c. 37, s. 54.

detaining it from the Crown, where the *cestuy que trust* has no relation, is different from detaining it against the *cestuy que trust* himself. If trustee should set up such a title, 'tis a case that never yet happened. If it did, I should think Courts of equity would go as far as they could, and I think trustee estopped against setting up that claim (*k*).

Then it was said, suppose mortgagor die without heir, shall the mortgagee hold the estate absolutely? And if he demands his money too against the personal representative, shall he have both land and money? If the mortgagor dies without heir or creditor, I see no inconvenience if the mortgagee held it absolutely. In the case of a forfeiture for treason, 'tis certain the Crown might redeem, as in *Sir Salathiel Lovel's Case* (*l*). And as to the supposition, that the mortgagee may demand his money too; that must be where the mortgagor dies without heir; therefore the demand must be against the personal representatives by virtue of some bond or covenant for payment of the money. And if the mortgagee took his remedy against the personal representative, I think the Court would compel the mortgagee to reconvey; not to the lord by escheat, but to the personal representative, and if necessary would consider the estate re-conveyed as coming in lieu of the personality, and as assets to answer even simple contract creditors. Under these circumstances, where is the great inconvenience? (*m*).

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Another case is put of a purchase, and the money paid by the purchasor, who dies without heir before any conveyance. Here 'tis said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. I think the lord could not pray a conveyance; to say he could, is begging the question. And as to the vendor's keeping both the estate and the money, 'tis analogous to what equity does in another case; as where conveyance is made prematurely, before money paid; the money is considered as a lien on that estate in the hands of the vendee (*n*). So where money was paid prematurely, the money

(*k*) See *post*, 170, 184.

(*l*) Salk. 85. Sir R. Strickland, having made a mortgage of his estate, was afterwards outlawed for high treason. On appeal to the House of Lords, the Attorney-General, on behalf of the Crown, was admitted to redem, paying what was due to the mortgagees; *A. G. v. Crofts*, 4 Bro. P. C. 126 (Toml. ed.). In the case of an attainder of the mortgagor, the mortgagee shall hold till the Crown thinks fit to redeem; *Reese v. A. G.*, 2 Atk. 223. So the King under an outlawry may redeem a mortgage; *A. G. v. Bassett, Parker*, 268.

(*m*) See Mr. Coventry's note to his edition of Powell on Mortgages, vol. i. c. x. p. 253.

(*n*) *Chapman v. Tanser*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; *Mackreth v. Symonds*, 15 Ves. J. 339; where Lord Eldon, C., says, that the doctrine of Sir

Thomas Clarke is very sensible; Id. 353; Ex parte *Peake*, 1 Madd. 356; *Blackburn v. Gregson*, 1 Bro. C. C. 420. But as a vendor has a lien also upon the personal estate, and may elect to resort to that fund upon the death of the purchaser, a question arises, whether in this case a Court of equity would marshal the assets in favour of creditors and legatees. That a marshalling of assets shall take place in favour of legatees against lands descended, see *Herne v. Meyrick*, 1 P. Wms. 201; *Clifton v. Burt*, Id. 678; *Bligh v. Earl of Darnley*, 2 P. Wms. 619; *Haslewood v. Pope*, 3 P. Wms. 323. These indeed were not cases, where the charge on the land was an equitable lien: but it is submitted that, from parity of reasoning, the assets would be marshalled also in that case: see *Pollexfen v. Moore*, 3 Atk. 272, where the Lord Chancellor said, he would direct the vendor

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would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things *in statu quo*.

But now, what are the inconveniences on the other side? This interposition prayed would change the law, and that too in the case of a legal tenant. It would give the lord a double chance. For this determination would be a precedent for an equitable escheat on the death of *cestuy que trust*, and there are other cases to warrant escheat on the death of trustees, unless the Court should interpose. And that lets in another objection; that 'tis bringing both into a Court of equity. If the inconveniences were greater than they are, and not over-balanced by those on the other side, yet I think arguments *ab inconvenienti* ought not to prevail, but where the case is doubtful. In *Pawlett's Case*, inconveniences appeared to Lord Hale, that the tenure would be destroyed by the estate's accruing to the Crown by the forfeiture: but did he object to the right of redemption on that account, or that any recompence should be made to the Crown in lieu of it? In the present case, I don't think the balance so near. The lord takes escheat subject to particular incumbrances, and even to the devise of the tenant. If she had contracted debts to the value, and the estate had been extended, or if tenant devised it, the lord *could not complain. Here she has put an end to her own tenancy to prevent the estate from escheating by her death without heir.

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I am for following the analogy of the legal escheat, as well as of the legal descent, and for pursuing legal principles; because the law gives the escheat only for want of a tenant, equity must do the same. If it did [not], 'twould be making law, instead of administering equity. I give no opinion on the right of the trustee; I give my opinion, that neither the maternal heir nor the Crown has any right. If the trustee *came* into a Court of equity, I might be of opinion that he had no right (o); but have

to take his satisfaction out of the purchased estate, because he would, by so doing, leave the personal estate an available fund for a legatee; who would then have a chance of being paid out of the personal assets. And the decree was, that the deficiency of assets for satisfying the purchase-money, and all his other debts, legacies, and funeral expences, so far as the personal estate of the purchaser was applied in *payment of the purchase-money*, should be made good out of the purchased estate, and a competent part was decreed to be sold for that purpose; Sugd. V. & P. 533 (6th ed.) The vendor in that case had also an equitable mortgage by retaining the title-deeds; and Mr. Sugden is of opinion, that that circumstance was the ground of the decree. But it is submitted, that the cases bear out the position, that where a vendor has merely an equitable lien, and resorts to and exhausts the personal estate, a le-

gatee or creditor may stand in his place, so as to resort to the purchased estate *pro tanto*. In *Austen v. Halsey*, 8 Ves. J. 483, Lord Eldon, C., says, "that the lien for the purchase-money is in equity very like a charge: and the cases of marshalling seem to have gone this length, that where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate." *S. P. Trimmer v. Bayne*, 9 Ves. J. 209: see also Lord Eldon's judgment in *Mackreth v. Symmons*, 15 Ves. J. 338-9,—344. As the vendor has a lien for the purchase-money, if the vendee become bankrupt, and upon a resale the estate produce less, he may prove for the difference; *Bowles v. Rogers*, 1 Co. B. L. 123; *Ex parte Hunter*, 6 Ves. Junr. 94.

(o) See *Williams v. Lord Lonsdale*, 3 Ves. J. 752.

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no occasion now to enter into the merits of defendant's defence. In bills of interpleader 'tis necessary to decide the right, because the money is brought into Court. So where trustee disclaims or desires to be discharged, and 'tis a contest between volunteers for trust money or trust estate, there the Court frequently determines the right of the defendant, to see to whom the estate is to be conveyed, where the plaintiff is not entitled. But even in that case they sometimes will not do it, but order a conveyance to a six clerk not to prejudice the cause. If plaintiff has no right, defendant may hold till a better right appears; the possibility of that happening shews the impropriety of entering into consideration of the right of the trustee. I am clearly of opinion that the invidiousness imputed to his defence ought not to give the plaintiff a better right.

Many other cases might be taken notice of. As the mortmain act; where use was given to a corporation aggregate, the stat. 15 R. 2, gave the lord a right to enter. So where given to a body not corporate, it is void, but don't say for whose benefit it is void. The lord could not claim it, nor the party against his own act. So purchases by Papists (p). So a lease by one joint-tenant to A. reserving rent, lessor dies, the surviving joint-tenant cannot have the rent, it enures to the benefit of the lessee. So the case of tenants before the late act (q), where rent could not be recovered, &c. So *Cowper* against *Cowper*, 2 Wms. *753. In all these cases it is to the last degree invidious, yet equity never interposed in any of them, though they lay under the highest temptation to do it before the late act, for the man held the land, and, but for an accident, must have paid the rent. There cannot be a stronger instance than *Cowper* against *Cowper* before Sir J. *Jekyll*. That was a demand set up by Mr. S. *Cowper* in a Court of equity, and as unfavourable a one as could come before a Court. Sir J. *Jekyll* says, "I own I cannot forbear declaring, that "were I to consider the matter not sitting in a judicial capacity, "but taking in all considerations, honour, gratitude, a man's "private conscience, &c., I must think that this claim ought "never to have been set up." But did this invidiousness prevent the success of the claim? So far from it, that this declaration of his is only a prelude to the determination he made. I shall conclude with what he concludes with there, concerning the province of a Court of equity and the boundaries of its jurisdiction. "Upon the whole matter my opinion is, this title "should not have been set up; but now it is so, it appears a "plain and a subsisting one; the law is clear, and Courts of "equity ought to follow it in their judgment concerning titles "to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are "said to be *secundum discretionem boni viri*; yet when it is "asked *Vir bonus est quis?* the answer is, *Qui consulta pa-*

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(p) By st. 11 & 12 W. 3, c. 4, s. 4; now repealed by 18 G. 3, c. 60: See The *Papists' Ca.*, 2 P. Wms. 4; *Carriek v. Er-*
rington, Id. 361.
 (q) 11 G. 2, c. 19, s. 15—See *Jenner v. Morgan*, 1 P. Wms. 392.

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" *tram, qui leges juraque servat.* And as it is said in *Rooke's Case*, 5 Rep 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections: So " the discretion which is to be executed here is to be governed " by the rules of law and equity, which are not to oppose, but " each in its turn to be subservient to the other. This discre- " tion in some cases follows the law implicitly; in others assists " it and advances the remedy; in others again it relieves " against the abuse or allays the rigour of it; but in no case " does it contradict or overturn the grounds or principles " thereof, as has been sometimes ignorantly imputed to this " Court. That is a discretionary power, which neither this " nor any other Court, not even the highest, acting in a judi- " cial capacity, is by the Constitution entrusted with." This description is full and judicious, and what ought to be deeply imprinted on the mind of every judge (r).

[* 153] * These are my sentiments, my Lord; and, as such, they are submitted to your Lordship's judgment.

Lord MANSFIELD.—On the ground of the case on the certificate, the whole turns on the effect and operation of the deed of 1718, in a Court of equity. The first question that arose, was between the heir and the trustee only. Sir F. Page entered 1738; and July, 1739, Burgess, as heir of Elizabeth Harding, brought his original bill against the trustee. On the 14th of July, 1741, the cause came on to be heard. On the pleadings being opened, and the nature of the question appearing, Lord Chancellor himself objected to the Attorney-General's not being a party, in respect of the King's right by escheat. Both parties were extremely desirous that there should be no question on the escheat, and the Attorney-General did not insist upon it; but the Chancellor asking him, if he waived any right the Crown might have, and would consent it might be so entered, the cause stood over. The Attorney-General was then made a party, and the information was filed on behalf of the Crown.

There are three competitors before the Court. Two claiming as plaintiffs, and praying relief; the third a defendant, objecting to any relief.

The heir on the part of the mother claims by an alteration having been made by the deed of 1718, in this Court as well as at law. And had the trustee conveyed to Mrs. Harding after her husband's death (the only purposes for which the trust was created being then ended) the heir on the part of the mother had undoubtedly been entitled.

The King claims, as the deed of 1718 is a conveyance only of legal form, and has in this Court made no alteration in the beneficial estate; but has left it to go in this Court, as it would have gone before at law, and as if the deed of 1718 had never been made.

[* 154] * The trustee objects to the heir's claim, because he says the

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deed of 1718 has made no alteration as to the beneficial estate of which Mrs. Harding died seised *ex parte paternâ*; and opposes the King's right, because it has changed the right of escheat both at law and in equity; and upon a general objection that the plaintiffs must recover upon their own strength to entitle them to relief: for it is not enough for the plaintiffs to shew that the defendant has no right, but that they have a better upon equitable grounds; and, in the case of a trust, must shew a better right within the terms of the creation of the trusts.

It seems agreed in this case, that the heir *ex parte maternâ* cannot inherit the trust, because the trust ensues the nature of the land; which before the deed of 1718 could not have descended in the maternal line; and I am at present of that opinion. The doubtful question is, Whether the King is entitled to this trust? And that will depend on arguments drawn from the nature and effect of a conveyance in trust, and from the nature of the right of escheat.

I will follow the method that was used at the bar, under the four following heads. 1st, The nature of trusts of land, and the rules that govern them. 2dly, The nature of that right by which the King claims in the present case. 3dly, Whether if the trustee had died *sans* heir, the King must not in that case have taken the land in a Court of equity subject to the trust. 4thly, Apply the result of this enquiry, as between the King and the trustee, to the particular point immediately in judgment.

I. As to the nature of trusts of land, and the rules by which they are governed. By an enquiry into the nature of an use or trust of lands, no more is or can be meant, than (as to uses) to find out historically on what principles Courts of equity, before 27 H. 8, received jurisdiction in modifying or giving relief in rights or interests in lands, which could not be come at, but by suing a *subpoena*: as to trusts, what the Court does in modifying, directing, and giving relief in the *said rights and interests in cases, where there is no remedy [*155] but by bill in a court of equity. Whoever shews, that the relief given now is more extensive, that it is considered by different or opposite rules, that the right is considered in different or opposite lights, will shew the difference and contrast between uses and trusts. The opposition is not from any metaphysical difference in the essence of the things themselves. An use and a trust may essentially be looked upon as two names for the same thing; but the opposition consists in the difference of the practice of the Court of Chancery. If uses, before the statute of Hen. 8, were considered as a pernaney of the profits, as a personal confidence, as a *chose in action*; and now trusts are considered as real estates, as the real ownership of the land; so far they may be said to differ from the old uses; though the change may be not so much in the nature of the thing, as in the system of law made use of upon it.

Having defined the terms, I will first shew negatively what

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is not the law and nature of trusts. I apprehend the old law of uses does not conclude trusts now; where the practice is founded on the same reason and grounds, the practice is now followed. Its positive authority don't bind where the reason is defective; more especially that part of the old law of uses, which did not allow any relief to be given for or against estates in the *post*, does not now bind by its authority in the case of trusts(s). The law of uses, before the statute, is the doctrine that gave rise to trusts after the statute, the struggle afterwards;—all that is present to our view is a series of things, that gives us perhaps a history of facts, and why they were; but gives us no plan consistently deduced from any system of natural justice, or public policy. Trusts, from the nature of the thing, may be left to the honour and faith of the trustee. In that case they are not the objects of law, otherwise than as they may be fraudulent and void in respect of third persons.

[*156] Or a court of justice may take *conusance and compel the execution of them. In that case trusts retain only the name of trusts: in substantial ownership the disposition in trust becomes the mere form of a legal conveyance. Trusts in England, under the name of uses, began, as they did in Rome, under no other security than the trustee's faith. They were founded in fraud, to avoid the statute of mortmain. Lord Bacon thinks them little known before Richard the second's time. Though the first hint of uses was probably to avoid the mortmain act, yet they were innocently applied, soon after, to other purposes. A benefit to issue out of lands could only be made by the interposition of uses. Wills of land could only be made that way.

Natural justice said, "He who breaks his trust does wrong." So *cestuy que use* was drove to Chancery by breach of faith. There were not six cases of uses before Edw. 4th's time. The Court first interposed on very narrow grounds; so far as a personal confidence was placed in the trustee, they decreed him to perform the trust; but the heir of trustee or grantee was not liable; Kelw. 49. *Subpœna* lay only against trustee himself till Hen. 6, and then *Fortescue* changed it; 22 Edw. 4, fo. 6, pl. 18. This was against the heir, but upon a reason that equally holds with respect to the grantee. The Chancellor afterwards extended his remedy, unless the alienee purchased for valuable consideration without notice.

While heir or alienee were not liable, the plan, though narrow, was consistent; and was adhered to through all its consequences. But when these two exceptions were made, it was absurd not to give remedy in all other cases within the same reason. Till Hen. 8th's time, the widow of trustee held her dower, the husband his curtesy, the lord his escheat, and the King his forfeiture, free from the trust. Yet their title was not in reason better than the heir's.

In the time of Richard 3rd, the King, though trusted as a

private man, and coming in the place of trustee who was a *vilein, alien, or traitor, might keep the estate, or give it away free from the use. Corporations, though expressly trusted, might keep the estate themselves. Thus stood the jurisdiction of Chancery with respect to those, *against* whom it was to give relief.

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The jurisdiction was as narrow in respect of the persons to whom relief was to be given. The widow, the husband, the creditor by real lien, the lord, the King, could not sue as standing in the place of *cestuy que use*, or being owner of the estate. Where the confidence was to an intent, that could not be executed, it never was settled what should be done with the estate; 5 Ed. 4, f. 7, pl. 18. Because the lord there could not have it, as he claimed in the *post; query*, Who shall have it? Bro. says, the heir shall not have it, because of the corruption of blood, and *ideo videtur*, &c. Bacon says, it should go to the will, or *in pios usus*. If a man appointed an use by his will to one for life, remainder in fee to another, and the *cestuy que use* for life refused; because there was no confidence for the heir, nor for him in reversion, the appointee or feoffee should hold the estate for life, some way or other, for the benefit of the feoffee, and not of the feoffor; 37 H. 6, cited there.

Great inconveniences arose from so narrow and contracted a system, that the *cestuy que use* should enjoy and dispose, and yet not be owner to all purposes; and that the feoffee, who really had nothing, should be deemed owner, so as to convey estates out of his seisin, by legal conveyance, not subject to the trusts. Bacon's Use of the Law sums it up very emphatically in these words; "There were so many inconveniences, "that uses, from a reasonable foundation, were turned to a "means of dispossessing many of their legal right. As the "man who had occasion to sue for the land, did not know "whom to sue, the wife was deprived of her dower, the husband of his tenancy by the curtesy, the lord of his escheat, "the creditors of their extent, and the tenant of his lease. For "these rights were given by law from the true owner to the "feoffee"(t).

*Many acts were made to cure these mischiefs in part; and [*158] all looking on *cestuy que use* as the true owner in the cases provided for, in respect to demanders, creditors, lords, and *cestuy que use's* alienees of all kinds. On the same plan at last the 27 H. 8, was made, that the use should be the universal legal ownership. Lord Bacon says, 'tis plain the statute meant to remedy the matter, because Use, Trust, Confidence, are used as descriptions of the beneficial interest, throughout the act. 33 H. 8, ascertains the forfeiture for treason, not with a view to trusts unexecuted; for 27 H. 8, has the word *trust* as synonymous to *use*; this statute only mentions *use*. Lord Hale says, on a case put after the statute, that the *use*, &c. By

(t) This passage is cited very incorrectly: see 1 Eden, 220, and the editor's note, *ibid*.

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33 H. 8 (v), *cestuy que use* forfeited for his own treason, and not for the treason of his trustee. In Bro. 340, held, on a sale an use could not be declared to the vendor; but from the nature of the transaction, and the price paid, the use must be to the vendee. And, in Dyer, 155, on a bargain and sale inrolled, no estate could be declared out of the use of the bargainee. From hence it grew to be a maxim, that an use could not be on an use. When this was established, there was no idea that a second use could have any existence or effect: but if it was an use, trust, or confidence, it was executed; if it could not be executed, it was nothing. Terms for years were not within the stat. 27 Hen. 8. Trusts might be declared of them, to be executed in Chancery. By the advice of the Judges, in Dyer, 369, such trusts were held not assignable, were as a right of action, and nothing at law, but were merely to be executed in Chancery. This notion arose from the practice of limited terms in trust; and 'tis strange, after a trust was considered in Chancery as an interest, the Judges did not say it should be executed as an use, a confidence, within the statute, or distinguish between trusts executed and executory. But because the whole trust could not be limited different ways, the real use should not be raised out of the nominal one. *After this was forced into Chancery, trusts long fluctuated under great uncertainty; 4 Inst. 85. In 43 Eliz., a trust was decreed in Chancery to be a mere right of action, and therefore not assignable. In Jac. 1st's time (*Abington's Case*) (v), all the Judges held the trust of a freehold estate was not forfeitable for treason: they must therefore consider it as a mere *chose in action*, 2 Roll. Abr. (C) pl. 1, fol. 780; trustee of a term for years is attainted of treason; the term is forfeit to the King, free of the trust, because the King comes in the *post*, and cannot be seised of an use. 11 Jac. 1, Cro. Jac. 513; trust of a term held forfeited, trust of a freehold not; and they argued, that the King should not have the trust too, as it was forfeitable by the trustee. The argument which gives the forfeiture in treason, holds not in the case of a trust. If it was the same as an use, the statute would have extended to it. After the Restoration, Hale, on the subject of trusts, followed, to a degree, the errors of the time, and applied to trusts what had made uses intolerable. 1 Ch. Cas. 12, circ. 14 Car. 2, he held a trust of a fee descended to the heir should not be liable in Chancery to specialty debts of the ancestor, so that it descended free from debts. In 15 Car. 2, *Colt* against *Colt*, 1 Ch. Rep. 254, it was held the widow should not have dower of a trust in this Court. 21 Car. 2, *Freem*. 139, Ch. Cas. 128, *Pratt* against *Colt*, held that the trust of a fee descended should not be liable to judgment creditors. So the heir took it free from all incumbrances (x).

Vide Ley. 40,
That the heir of
the trustee
should be in
ward; M.
10 Jac. 1 (w).

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(v) C. 20, s. 2: see 1 Hale, H. P. C. 248.

(w) But see 1 Hale, H. P. C. 248-9; *Reeve v. A. G.* 2 Atk. 223.

(x) *Gaubert's Case*.

(z) This is remedied by the statute of frauds, 29 C. 2, c. 3, s. 10: see *Doe v. Greenhill*, 4 B. & A. 684.

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This, to 22 Car. 2, may shew how they reasoned in Westminster Hall upon trusts; *Pitt* against *Pellam* (y): the testator appointed his land to be sold, and the purchase-money to be divided among four persons, one of whom was his heir at law; but he did not devise his lands to any body, he did not give any body power to sell, he placed no express confidence in the heir to sell. The Master of the Rolls made a case to be heard before Lord Keeper. Diligent search was made for precedents, then a trial was ordered in Common Pleas, to see whether the executrix of the testator, or her executor, she being dead, had a legal power to sell by implication. Upon a special verdict being found, the Judges negatived any such power. The cause came back into equity; and, after all, the Lord Keeper held the heir not liable as a trustee to perform the devise, or make any conveyance to a purchaser, and so dismissed the bill (x).

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In my apprehension, trusts were not on a true foundation, till Lord Nottingham held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the Legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer the exigences of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute Hen. 8, meant to avoid.

The *forum*, where it is adjudged, is the only difference between trusts and legal estates. Trusts here are considered as between the *cestui que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates,) as the ownership and as legal estates, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. The statute of frauds speaks of devises only of lands and tenements; yet the trust, being considered in this Court as the land and tenement, can only be devised as lands and tenements may pursuant to that statute. How different is it from an use! That is neither land nor tenement. This act gives sanction to trusts divided from the estate, and guards them from danger of parol proof.

It would be endless and unnecessary to enumerate the various consequences through which the principle has been pursued, that a trust in Chancery is the estate at law, since 22 Car. 2. Among others, it has been declared, that the husband should be tenant *per curtesy* of a trust; the case of dower is the only exception, and not on law and reason; but because that wrong determination had misled in too many instances to be now altered and set right. *Radnor* against *Vandebendy* (a) was determined on that principle only in the House of Lords. In *Banks* against *Sutton*, the argument of Sir J. Jekyll proves,

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(y) 2 Freem. 134, 1 Ch. R. 283, 1 Ch. Ca. 176.

heir should sell; S. C. 1 Lev. 304, T. Jon. 25.

(z) But his decision was reversed in Dom. Proc., and it was decreed, that the

(a) 1 Vern. 179, 356, Show. P. C. 69.

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there ought to have been dower of a trust, and he stretches there to make a distinction. In *Attorney-General against Scott* (b), that was not followed, because it would shake so many settlements. In *Casborn* against *Inglis* (c), Lord *Hardwicke* says, "How it came to be so settled at first, is a different consideration, and difficult to find out a sound reason for: but now we must adhere to it as established." The dissatisfaction has not been from allowing the tenancy *per curtesy*, but from denying the tenancy in dower, of a trust. And, if an alteration was to be introduced, the best way to set it right would be to allow the wife dower of the trust estate. Twenty years ago I imbibed this principle, that the trust is the estate at law in this Court, and governed by the same rules in general, as all real property is, by imitation. Every thing I have heard, read or thought of it since, has confirmed that principle in my mind.

In *Banks* and *Sutton* (d), Sir *J. Jekyll* boggled at imitating the legal right (which depends upon an actual seisin of the freehold during the coverture) and of applying it to an equity of redemption. In the eye of this Court Lord *Hardwicke* thought, the equity of redemption is the fee-simple of the land. It will descend, may be granted, devised, entailed, and that equitable entail be barred by a common recovery. This proves it is considered as such an estate, whereof in consideration of this Court there may be a seisin; for without such a seisin, a devise could not be good of a trust. He who has the equity of redemption is considered as the owner of the land. He says, 'tis a settled right in equity, which a man can't come at, but by *subpoena*,—That the husband and wife being in perception of the rents and profits during the coverture, were seised of a freehold by imitation of the law. The allowing tenancy *per curtesy* of a trust is founded on the maxim, that equity follows the law; which is a safe as well as fixed principle; for it makes the substantial rules of property certain and uniform, be the mode of following it what it will.

[*162] So that I take it by the great authority of this determination, on clear law and reason, *cestuy que trust* is actually and absolutely seised of the freehold in consideration of this Court: and therefore that the legal consequences of an actual seisin of a freehold, shall in this Court follow for the benefit of one in the *post*.

To conclude this head. An use or trust heretofore was (while it was an use) understood to be merely as an agreement, by which the trustee and all claiming from him in privy were personally liable to the *cestuy que trust*, and all claiming under him in like privy. Nobody in the *post* was entitled under, or bound by the agreement. But now the trust in this Court is the same as the land, and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a

(b) *Forest*. 133.

(c) *Or Scarfe*, 1 Atk. 603: see *Dixon*

v. *Savile*, 1 Bro. C. C. 326.

(d) 2 P. Wms. 700.

benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared, it results by necessary implication; because the trustee is excluded, except where the trust is barred in the case of a purchaser for valuable consideration without notice. The trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. There is no distinction now between those in the *per* and *post*, except in that case of dower, which is founded not upon reason but practice. As the trust is the land in this Court, so the declaration of trust is the disposition of the land. Therefore an essential omission in the legal disposition shall not destroy the trust. As where trustee dies before testator, or is incapable; upon the old notion of an agreement, a *sub-pœna* could not lie against the heir, where the legal limitation was void. The grounds why the lord by escheat neither took, nor was subject to, an use don't now subsist: the principles upon which the question must now be argued have no relation to it, whichever way it ought to be determined. Or rather, none of those principles were made or could ever be considered in the law of uses; for this Court never interposed in cases, where * the claim was in the *post*; and there in Edw. 4th's time, 'tis [* 163] taken for granted that the lord shall not have it. 'Tis a fixt principle that he shall not, because he is in the *post*.

II. This brings me to consider the nature of this right by escheat.

It has been truly said; in the beginning of feodal tenure this right was a strict reversion. The grant determined by failure of heirs; the land returned as it did upon the expiration of any less temporary interest. 'Twas no fruit, but the extinction of tenure (as Mr. Justice *Wright* says), 'twas the fee returned. This definition holds equally, whether the investiture was to special or general heirs; for originally, by feodal law, tenant could not alien in any case without the lord's concurrence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what in point of law amounted to a consent to a new investiture or change of his vassal. This is the meaning of the distinction taken in the books, which mentions that nothing escheats where the tenant is in by title. Any man in possession by being tenant to the lord could not strip him of the reversion. Hence it followed, that the land returned in the state, in which it was granted, free from incumbrances. As soon as a liberty of alienation was allowed, without the lord's consent, this right changed its name. It became a sort of caducary succession. Thence the lord called *tanquam hæres*, Craig, l. 2, c. 2, § 12—15. Lord takes as *ultimus hæres*, &c. The resemblance of the lord's right by escheat to the heir's by descent does not hold throughout; and therefore the lord by escheat is (in Co. Litt. 215 b) with accuracy considered as assign in law. He took no possibility, or condition, or right of action, which could not be granted. He could not elect to avoid voidable acts, as feoff-

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ment of an infant with livery. But every right preserved to the heirs, which could be granted, goes to the lord by escheat. As if tenant makes lease for life, *reserving rent to him and his heirs, the rent will go to the lord as well as the inheritance. *Thurston against Attorney-General*, 1 Vern. 340; the benefit of a trust term in an estate was decreed to the King by escheat; for, says the Court, the term goes with the inheritance by express limitation of the parties. The inheritance is escheated in the same manner, as if it had descended or been granted. Where the former owner has made no disposition, or left no heirs by blood, it must go somewhere. 'Tis arbitrary, before settled; when settled, 'tis as favourable as any other positive rule. From the original nature of the tenure, the lord took it. In personal estates, which are allodial by law, the King is last heir where no kin; and the King is as well entitled to that, as to any other personal estate. This brings me to the third head.

III. Whether, failing heirs of the trustee, the King must not, in this case, have taken the estate in a Court of equity, subject to the trust.

This seems, in the present case, to be a very material consideration. For, if the King is not to be subject to the trust, there is no colour that he should claim the trust by escheat, though barely being in the *post* seems no objection now. That land escheated should be subject to the trust, seems to me most consistent with the King's right; whether the escheat be considered as a reversion as it once was, or a caducary possession *ab intestato* as it now substantially is. Considering it as a reversion. The King, as a reversioner, could not claim it in this case, but under the deed of 1718, as the investiture under which his tenant died seised. There is no other way of shewing the trustee to have been his tenant at all: The possession was with Mrs. Harding to the time of her death. Every alienation of a fee has some investiture. The land descends in the alienee's blood, and when that fails, the lord takes. But the lord can't claim against his own *grant: He is bound by the terms of the alienation. If Mrs. Harding had made a will, how could the King claim against the deed made by the grantee to empower her to make a will? The King could set up no right by escheat to defeat the execution of that power. But one case, in which a possibility of reverter could remain after a fee granted: And that is, where lands are granted to a corporation; if corporation dissolved, the lands return to donor or his heirs (e). The King can't claim by escheat contrary to the terms or conditions, which the tenant held under. Two things;—1. That there is equity against the King. 2. That the lord is bound as much in a Court of equity by the equitable terms of his tenant's investiture, as he is in a Court of law by the legal terms.

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Taking the estate as a caducary possession, the lord can

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only take it *ab intestato* absolutely. So far as the tenant has not disposed of the estate, he can take, and no farther. The tenant's power of disposing is absolute, without the lord's privity, without any determined form of conveyance. The trustee has by his declaration of trust in 1718 made a valid conveyance of his trust in equity; and therefore a Court of equity cannot, I apprehend, suffer the land to go as undisposed of by the tenant, because, in the consideration of this Court, there is a valid disposition made by him. But even at law the escheat could not be free from the trust. The statute of frauds makes a trust estate assets in the hands of the heir of *cestuy que trust* (f); consequently, for that purpose the estate descends to the heir. In 18 Car. 2, before trusts were put on the rational footing they now are, the apprehension of the Judges was, that the lord by escheat ought to be subject to the trust: Lord *Bridgman* thought so (g). In 1702, Sir *J. Trevor* upon the same principle thought so, in *Eales against England* (h). Yet Sir *J. Trevor* certainly knew there could be no escheat of an use. If it was not to be subject to the trust, I think the inconvenience would be very great; and where we are not tied down by any erroneous opinions, which have prevailed so far in practice, that property would be shook by an alteration of *them, arguments of convenience and inconvenience are always [*166] to be taken into consideration. All the great estates of this kingdom almost are now limited in trust. The trustees are men of business, probably concerned for the family, and at a little distance of time their pedigrees are not to be traced. And if the surviving trustee was to die without heir, 'twould be thought very hard, if that should lose the estate. But I rest upon this: It seems to me a contradiction in terms, that he who has no claim but *ab intestato*, where the owner has not disposed of his property, should take contrary to and in prejudice of his disposition. The heir of blood might as well claim the estate in contradiction to the equitable charge. An escheat is now as much a title under the former owner, by consequence of his former seisin, as the heir. Why else shall the lord be deemed the assignee or heir of the tenant? I think the lord may be considered as much his heir, as his heir by blood, and is as much liable to all the dispositions. Suppose a devise ineffectual in law, but good in equity; would the estate escheat free from the trust? Suppose a devise to a trustee, in trust to pay debts and legacies, and trustee dies without heir (i); are all these charges to be gone, and not carried into execution, and the estate to escheat free from 'em? To bind the lord, there is no distinction between voluntary and meritorious limitations. The lord by escheat must, in consequence of the tenant's disposition, be a trustee for all or none.

(f) See n. (x) *ante*, 159.

(g) In *Geary v. Bearcroft*, Carter, 67: but it appears that that report is erroneous; see 1 *Eden*, 230, n. (a), 2 *Fonbl. Eq.* 170, n. (5th ed.) See also *Stevens v.*

Bailey, Nels. 107, and 3 *Cruise Dig. tit. xxx*, s. 39, p. 476; 1 *Cruise Dig. tit. xi*, c. ii, s. 15, p. 365, and n. (b), *ante*, 142.

(h) *Prec. Ch.* 202.

(i) *Reeve v. A. G.*, 2 *Atk.* 223.

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But objections have been taken to subjecting the escheat to trusts.

Objection 1. From copyholds and the customs of manors. There the lord can't be subject to trusts, but takes the estate on the death of the tenant without heir. *This objection proceeds from not distinguishing between freehold and copyhold manors. In all manors, where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In those copyholds, the lord is not bound by debts, alienation, or trusts; they are all void against him. But if he consents to a condition or trust on the Court-roll, then he is bound by it, for he can't claim against his own act (*k*). But in freeholds, the form of his concurrence not being necessary, he is always considered as much bound, as if he was a party to the deed of alienation which makes the trust; because the power which the tenant now has by law, is equivalent to the lord's consent to the grant, when it was a strict reversion.

Objection 2. If the trustee is not to be considered as tenant without regard to the trust, in the case of escheat; then the lord can't be permitted to consider him as tenant, in case of heriot and relief. *Brown's Case*, Vern. (*l*). If the objection is applied to copyhold manors, it receives the same answer. The roll shews the tenure. If applied to freeholds held of the King or mesne lords, the case of heriots and reliefs is of no great consequence; but however [the lord] can't be hurt; for a conveyance in trust would be void, and fraudulent against the lord, in respect to them. The *cestuy que trust* is the visible

(*k*) *Anon.* 4 Leon. 88, ca. 186; *R. v. Haddenham*, 15 East, 463; see also *Peachey v. Duke of Somerset*, 1 Stra. 454, per Lord Macclesfield, C.; *S. C. Prec. Ch.* 573, 6 Vin. Abr. *Copyhold* (D c.) pl. 9.

(*l*) *Trin. Coll. v. Browne*, 1 Vern. 441. It appears by the preamble to the statute of uses, that the lord's loss of wards, marriages, reliefs, heriots, and escheats, are enumerated among the many mischiefs of uses. Now many statutes had been before made at different periods for remedying the mischiefs of uses in particular cases, and by the statutes 4 H. 7, c. 17, and 19 H. 7, c. 15, the lord was to have relief on the death of the heir of *cestui que use*, if the use descended to him; but no remedy was provided for the loss of escheat: and therefore as the law stood at the time of the making of the statute of uses, if *cestui que use* in fee-simple had died without heir, the land would not have escheated, that mischief not being provided against by any former statute, and therefore that mischief (if it deserves that name) continues with respect to such uses and trusts as are not executed by the statute. For, with respect to them, the law continues the same since, as it was before, the statute of uses. The above mentioned statutes of H. 7 are, in Co. Lit. 84 b, and 91 a, mentioned to be obsolete; and they would have been so,

had the statute of uses annihilated all uses and trusts. But by subsequent construction of it, since Lord Coke's time, it has been settled, that where in a feoffment or other conveyance there is a limitation of a use to the feoffee or grantee, and afterwards in the same deed another limitation of a use of the same lands to another person; there the second use will not be executed by the statute. *Quære* therefore, why the above mentioned statute of Hen. 7 should not still be considered as operating on such second uses? Yet those statutes seem to have been considered in the light they were viewed by Lord Coke ever since the stat. of uses, for in *Trin. Coll. v. Browne*, no notice is taken of the stat. 19 H. 7, c. 15, though the lord's loss of heriots is specially provided against as well as the loss of reliefs. It is true this statute in terms extends only to lands holden in socage (as the 4 H. 7 did to those holden by knights' service), and in the case in *Vernon* the lands were holden of the College, as of their reversion: but it does not appear to have been determined on that distinction: and it is cited here as an authority, without taking notice of any such distinction: and I do not recollect any argument from either of those statutes, or so much as any notice of either, since the statute of uses. See also Co. Lit. 76 b.—*MS. Serj. HILL.*

possessor. And I should think in the present case, if a heriot was due from the tenant, the deed of 1718 is void against the lord, in respect of heriots and reliefs. See how it stands. Mrs. Harding kept possession till her death. The lord could not know of this secret deed made by her in trust for herself, or where the deed was. And she would be considered as his tenant. But suppose he knew it, and chose to consider the trustee as his tenant at law: I think he may do it in all cases, where the trustee is party to the conveyance, and has accepted the estate; and then no colour for Court of equity to interpose. The trustee can't object, because by his own agreement he has made himself liable to the burdens annexed to the estate; and he can't be prejudiced, as the estate is a pledge in his hands to reimburse him. And where *trustee is the visible tenant, the lord can only consider him as tenant. The mortgagee in fee would be tenant to the lord in respect of his heriots and reliefs, and he could not come on the mortgagor for 'em, while the estate remained unredeemed. But where an escheat happens, it does not follow but that the Court may interpose to substantiate the agreement of the parties, though they do not when there is no agreement.

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Object. 3. 'Twas said, a mesne lord, by death of mortgagee without heirs, can take the escheat in preference to the personal representatives, who are entitled to the money, and in opposition to the mortgagor, who is entitled to the redemption. This would be glaring injustice. *Pawlett's Case* (m) seems settled on a true foundation, and this precise objection was in terms over-ruled. Lord Hale says, the tenure is extinguished, but it is over-ruled. Another answer occurs, that the lord may continue the tenure by accepting the *cestuy que trust* as tenant. If the lord admits his title, there will be no escheat. The King and the lord together may revive the tenure. Another answer that occurs is, that if the tenure was destroyed, any benefit arising from it to the lord might be secured by a decree to hold and enjoy. The last answer is, that if it should extinguish the tenure, the law never thought that sufficient to abridge the tenant's absolute right of alienation. So in the case of a grant in mortmain. It is said, that the King must take it free from the trust, because the King can't re-convey it; but this would hold equally in the case of mortgages, and the purpose might be answered another way,—there might be a decree to hold and enjoy. If it was so, 'tis strange to say that therefore he shall lose the whole estate, and have no relief at all.

IV. If what I've said be right, little is left for me to say upon this head. If lord takes an escheat as heir or assignee in law, then the King is within the express declaration of trust, which is to Elizabeth Harding, her heirs and assigns. If [the] King would take it subject to trusts, he must of course be *entitled to an equitable estate by escheat. He can be subject to the trust on

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(m) *Ante*, p. 144.

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no other ground, than that *cestuy que trust* (the true owner in the consideration of a Court of equity) dying *sans* heir, the escheat is to arise; for else, 'twould be a fee on a fee. It would be to *cestuy que trust* and his heirs, and for want of such heirs, to the trustee and his heirs, which is void in law, because of the lord's escheat. If the trust be the land, Mrs. Harding died seised of the old use of that land. The King's right by escheat stands on the same ground, as every other legal right; it arises out of the seisin. And Lord Bacon says, they who come in by justice and consideration of law, are of all others most favoured. On that principle stands the forfeiture by escheat, the tenancy by curtesy, and in dower. 27 Hen. 8 expressly recites this grievance, and a wise plan in equity is established by considering the trust as the lands, to avoid every inconvenience that arose from an use.

As to Sir *George Sandys'* Case (n), it has great weight; but I can't agree, when a trust descended to the heir, that the heir should take the land free from the specialty debts of the ancestor; there the trustees, the heirs of blood to the felon, and Sir R. Freeman, were all in the same interest. If they had been adverse, perhaps it might have been argued, that it resulted to Lady Sandys, the daughter and heir of Sir Ralph. The trustee could take nothing to himself against the former owner, and his heirs. The circumstances of that case were compassionate. If the King had restored the estate to the family, and the trustee had insisted on keeping it, 'twould have undergone a different examination from what it did.

The principal reason is, that escheat is for want of a tenant. A trust is like a rent-charge: when it fails, it extinguishes in the estate, for the benefit of the owner. [That] there can be no escheat of an use (the second reason) seems incorrect; the escheat is for want of a tenant; the lord being assignee here is a tenant at law. It does not prove but that there may be an estate in the trustee.

[*170] *It is said, the escheat is in lieu of services. True, but it does not conclude but the tenant may be a trustee. There is a declaration, that trust does not extinguish for the benefit of the trustee, but of the true owner; which is clearly settled. The reasoning, with regard to those who claim in the *post*, does not conclude one way or other; but, in fact, the true foundation of trusts was not then laid. Lord Hale himself had held, a trust descended to the heir was not liable to debts; he went on a principle that failed, and whatever is built upon it, fails with it.

It is a matter of importance, to settle on what principles the present determination is made; because many consequences may hereafter be drawn from it. If mortgagee in fee dies without heir, 'tis now settled the estate escheats, subject to the mortgage, and the money must be paid to the personal representative. But suppose mortgagor dies *sans* heir, shall the mort-

gagee hold the land absolutely (o); if he demands the money of the personal representative, shall he have the money and the lands too? If not, to whom shall he convey it? If to the King, then a right of escheat followed in equity by analogy. I don't say on any ground established, what the determination must be in that case. It must be upon reasoning, not upon principles yet settled. Whether it may not be reasonable under particular circumstances, can't be questioned. This Court does not act arbitrarily, but by a system of equity, which is as much the law, as that on the other side of the Hall.

In case of felony, shall trustee hold against the felon, if pardoned, or against the heir of the ancestor executed, although the King would restore it? (p). I can't answer it upon principles: I can find no clear and certain rule to go by; and yet I think equity should follow the law throughout. Yet I am satisfied it must shock common sense, that the heirs of an attorney or the trustee should take the estate from the family of the owner, the King, and every body else. The least analogy to any legal right ought to be preferred to the trustee, who is the mere form and instrument of conveyance. **Thruston against Attorney-General* (q) shews a right by escheat is a ground to come into equity against a trustee, to pray conveyance. *Palmer against Attorney-General* before Lord *Nottingham*; after stating the case, he concludes—"Note, if a forfeited mortgage in fee escheat to the King, yet mortgagor's equity of redemption is not lost, though the King comes in the *post*. If then there be equity against the King's escheat, why should [there] not be equity for it?"—And so he orders a case to be made and argued, and decreed, that there was an equity for the King's escheat. The exclusion of the trustee from all benefit was surely in the contemplation of the parties. To determine otherwise would be to contradict the intent of the deed of 1718. The death of *cestuy que trust sans heir* was not at all thought of. They have declared the trusts, and that there should be no other: Whatever results necessarily from the agreement, was the intent of it. The holding to other purpose than on the trusts, could never be intended; he is to hold to no other purpose.

It has been said, the declaration and agreement can't extend to the lord, for that the trustee holds it subject only to the trust created by or arising from the deed: And if so, here the lord takes an interest, which could [not] (r) have been even given by express limitation; for 'tis said that the trust could not be limited to the lord on failure of heirs to Mrs. Harding, because it would be a fee on a fee, and therefore void; Vaugh. 270 (s). But I apprehend, that the limitation of a trust to the lord, failing heirs of Mrs. Harding, would have been good, be-

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(o) See *ante*, p. 149, and *post*, p. 184—also *Coventry's Pow. on Mortgages*, 253, n. (5th ed.)

(p) A power to do which is reserved to the Crown by 1 Ann. st. 1, c. 7, s. 8.

(q) 1 Vern. 340.

(r) The word *not* is in 1 Eden, 237, and in Serjeant Hill's MS.; and the sense requires it.

(s) *Gardner v. Sheldon*: see *Bull. Fearne*, C. R. 372, and *Doe v. Holmes*, *post*, 777.

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cause such a limitation would have been good in law, and is implied in the conveyance of every legal fee.

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Upon the whole, I think the King is entitled to a decree. But if I am wrong in the principles I go upon, or (as is possible) in the application of them—if the deed of 1718 has conveyed a new fee, and changed the line of heirs, upon which the escheat was to arise in this Court as well as at law; then, *as between the heir *ex parte maternâ* and the trustee, I think the heir is entitled to a preference and a decree.

Before 27 Hen. 8, if a man conveyed to use of himself and his heirs, the Chancery thought, that no change of the seisin was intended by such conveyance. And they decreed the estate to go as the old use would. The Court never decreed against estates in the *post*. The trust should ensue the nature of the use executed. But if settled, that the lord shall not be entitled by escheat, as if the old estate continued, and then a new question arises between the heirs of the old purchase and the trustee: Elizabeth Harding was seised *ex parte paternâ*; and whether she has acquired a new fee, can only be disputed by the lord of the fee. Co. Litt. 12. The feoffee can't restrain the rent or condition to the paternal line (t). Suppose trustee covenanted to convey to Mrs. Harding or her heirs, he can't say that it is restrained to her heirs *ex parte paternâ*. If he had reconveyed to her in this case, it would have descended to the heirs of purchase, and consequently, in the event that has happened, to the maternal heir. And there's no instance where a trustee can, by delaying a conveyance, create a benefit to himself, though he is never called upon so to do. When the blood of the grantee fails, the lord is entitled. In justice to the maternal heir entitled under the old investiture, it was, before stat. H. 8, and is now presumed in equity, that the owner meant no alteration of the old seisin by the conveyance in trust, which left the estate and ownership as it was. So that the conveyance leaves the estate just as it was. I think the reason should not be confined to the heirs under the old investiture, but should be extended to the lord. But if the lord is out of the case, there seems no reason to confine it to the paternal line. As between the heir and the trustee, as between Mrs. Harding and her trustee, the deed of 1718 is an original act, and the trustee's title is wholly derived under this deed. And every reciprocal engagement on his part to Mrs. Harding and her heirs, is confined to that deed. Both lines

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are of her blood, and within the term *heirs* in the *agreement, and within the express terms of his undertaking, and not only by necessary implication. But the trustee is intended to take no benefit himself, from the natural affection which Mrs. Harding may be supposed to have for all the heirs of her blood. There is no case, that the feoffee shall exclude the heirs by purchase, for his own benefit. No saying in the books before or since 27 H. 8, to this purpose; and in my apprehension, it

(t) See *ante*, p. 128, and *post*, p. 184.

is as much against conscience as law, upon the reciprocal agreement. To establish a trust for his own benefit and to restrain his engagements made to Elizabeth Harding and her heirs to the paternal line, seems unreasonable.

With regard to the preliminary points, they are so clear, I shall say nothing upon them.

I am sorry to have taken up so much time. I thought it necessary to do it, as I differ from so great authority.

LORD KEEPER.—There is one objection, and two claims, upon which I am now to give my opinion. I agree with the Lord Chief Justice and his Honour, as to the objection.

As to the other points, I think myself very much obliged to Lord Chief Justice and his Honour, and return them my thanks for their learned assistance, and their free and unreserved communication of their sentiments to me, during all the time that this matter has been under consideration.

I. First, I shall take notice of the claim of the Crown, because several of the arguments I shall make use of on that, will tend to support the opinion I shall give on the other claims. The question on the information is, whether the *cestuy que trust* dying without heirs, the trust is escheated to the Crown, so that the lands may be recovered in a Court of equity by the Crown, or whether the trustee shall hold them for his own benefit. (States the case). *On 11 January, 1718, Mrs. Harding conveys to trustees (of whom Sir F. Page was the survivor) the lands in question, in trust for Mrs. Harding, her heirs and assigns, to the intent that she should appoint such estates thereout, and to such [persons], as she should think proper. Mrs. Harding dies without making any appointment, and without heirs *ex parte paternâ*. The information charges, that the trustee took no benefit, but only for Elizabeth Harding, and to be subject to her appointment; and that she being dead *sans* heirs on the father's side, and having made no disposition of the estate, that Sir F. Page could take no estate for his own benefit by the deed or the fine, but takes it for the benefit of his Majesty, who stands in the place of the heir, and that the premisses are escheated to his Majesty. The question therefore is entirely a question of tenure, and not of forfeiture.

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I shall consider, first, The right of lords to escheat at law. Secondly, Whether they have received a different modification in a Court of equity. Thirdly, The arguments used in support of the information; and from the whole draw this conclusion, that the Crown has in this case no equity.

1. I shall consider the law of escheat, as settled by the municipal writers in the law, and reporters: and shall not regard what the law was in other countries; as they seem founded and calculated for empire and vassalage, to which I hope in this country we shall never be subject. I will just give a specimen of the feudal law. Craig, 504. *Causæ Amissionis Feudi*: These causes are, incestuous marriages, parricide, fratricide, friendship contracted with the lord's enemies, revealing the

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lord's secrets, if they affect his life or reputation, outlawry not reversed, and all other causes in the discretion of the *prætor*.— I cite this, to relieve me from the doctrine of the feudists. The legal right of escheat with us arises from the law of infeoffment to the tenant and his heirs, and then it returned *to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, is accurately traced in a treatise of tenures by a learned hand (v);— this reduces the condition of the reversion to this single event, *vis. Ob defectum tenentis de jure*. F. N. B. 337; A writ of escheat lies where tenant in fee of any lands or tenements holds them of another, and the tenant dies seised (u) without heirs general or special, the lord shall have the land: because he shall have it in lieu of his services. The books are uniform, that in the case only of tenant's dying without heir, the escheat took place. As long as tenant or his heir, or, by his implied assent, another continued in possession by title, that prevented escheat. The law had no regard to the tenant's right to the land, but in right of his seisin. All these instances shew, that where there was a tenant actually seised, though he had no right to the tenements, and though the person who had the right died without heirs, yet the escheat was prevented. For if the lord has a tenant to perform the services, the land cannot revert in demesne. Roll. Abr. 816. *Whittingham's Case* (w). 7 Hen. 4, Heir of Disseisor. 1 Inst. 268 b, Feoffee of Disseisor. Upon these cases I would observe, that the lord's consent had nothing to do with establishing the right of the tenant's being duly seised, because in every one of these cases they all come in without the lord's consent; unless it may be said, that the lord is a virtual assenter, as well to the disseisins as the legal conveyances. And then, if that be so, it would operate to the establishing the right of the trustee here, who would say he is entitled under a conveyance in law, by the very consent of the lord; which is a stronger case than a disseisin. From these cases and authorities it must be allowed to be settled, that the law did not regard the tenant's want of title, as giving the lord right to escheat.

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*2. The next consideration is, whether a Court of equity can consider it in a different light. Now when the tenant did not die seised, and a proper legal tenant by title continued, and consequently, the lord's seignory and services continued; can this Court say to the lord, Your seignory is extinguished, and

(v) Sir M. Wright.

(u) "The words of F. N. B. are so: but *vid. F. N. B. 338 (C)*, in these words:— "And if the tenant be disseised, and afterwards dieth without heir, &c., it seemeth the lord shall have a writ of escheat, because his tenant died in the homage." *Contra*, 32 H. 6, 27 a, pl. 16, and so cited in Com. Dig. *Escheat* (B 2.); and the distinction there is, that if the tenant be

disseised, the lord may enter, but not have a writ of escheat: but if the disseisor had died seised, the lord could neither enter, nor have a writ of escheat, *ib.*: and it seems, by the reasoning of the Court, 32 H. 6, 27 a, that the lord can in no case have a writ of escheat, except where his entry was lawful; *ibid.*"—*M.S. Serj. Hill.*

(w) 8 Rep. 42 b.

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to the tenant, Your tenancy is so too, though both are legal rights now subsisting at law? In consideration of uses with regard to escheats, equity has proceeded on the same principle as the law, where there was a tenant of the land that performed the services. And I don't find this Court had any regard to the *merum jus* of the tenant. Now the reason why there was no escheat on the death of *cestuy que use* in equity seems to be this, (and it is a reason equally applicable to uses and trusts), that the Court had nothing to issue a *subpoena* upon, no equity, nothing to decree upon; and every person must bring an equity with him for the Court to found its jurisdiction upon. It seems to me he could have no equity in the case of an use, or as owner of a trust, for this plain reason: an use before the statute could not be extended farther than the interest in the estate which the creator of the use could have enjoyed: as if the creator of the use had a fee-simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land: if he makes a feoffment, and declares no uses, it results to him in fee, which is to him, his heirs and assigns. The consequence is, that the moment he dies without heirs or assigns, there was no use remaining. How then can you come here for a *subpoena* (whether he took back the same or a different use) to execute an use or trust which was absolutely extinct? That seems to me the plain and substantial reason, why in this case (whether you call it an use or a trust) there was no basis on which to found a *subpoena*. Lord Chief Justice's system is very great and noble, and very equitably intentioned. Such a system as I should readily lay hold of upon every occasion, if I thought I could do it consistently with the rules of law.

* What scintilla of equity is given to the lord? Lord Chief [*177] Justice supposes, that by feoffment to two trustees for Mrs. Harding, her heirs and assigns, and for no other use, the lord is included in "her heirs and assigns." That expression cannot do so. I think the conveyance would have been the same, if *assigns* had been left out. Then it is said, the express declaration is to her heirs and assigns, and that there is an implied trust on this; for as the trustees are to take to no other use, and the express trust is served; therefore a trust in fee results to the lord, upon the extinguishment of heirs *ex parte paterni*. To that conclusion I have two objections: 1. I think such a trust would, if declared, be entirely void; (and whether declared by way of trust or use, it is the same thing), for when you have limited an estate to a man in fee, or declared the trust to him in fee, you have no more to dispose of in either case, and cannot limit one fee on another. It is said, in answer to this, that she could not have limited it to Sir F. Page and his heirs in default of her own heirs, but that a person may limit any thing according to the course of law, and there's a reverter to a person in fee in the course of law, therefore you may limit it so. But it reverts by operation of law on extinguishment of an estate, that was a fee-simple incapable of any

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farther limitation. The donor could not have limited it so. 2. With regard to the resulting trust there is this objection, which seems to me unanswerable. What is the estate conveyed to the trustees? It is Mrs. Harding's estate. Her husband and she are parties to the deed and fine. They pass all the estate that goes to the trustees. Can any thing result by way of trust or use, to a person not privy to the estate that passes by the deed? Where you have passed the estate without consideration, there in modern language an use results, or a trust results; because it is unequitable that a man should have an interest in the estate, when he has paid no consideration for it. But where a person is not party to a deed nor privy to the estate, I don't see how any thing can result for his benefit.

- [*178] That this was the *notion in respect to an use, appears from authorities. The law was, that the lord could not have the escheat of an use. So is 5 Ed. 4, for I take that to be the report of a case; then it has all the authority the Year-books carry with them. And this has been adopted by all the writers since. Bacon, 79, does not question the authority of this case. He gives a reason of his own, which he substitutes as a better than that in the books, that there is a tenant in by title, which is a strong reason in law; but it does not mention that as a reason with regard to the *subpœna*.—It is not a conclusive reason, that the lord shall not have *subpœna*, because there is a person in possession. He should have it for that reason, if that person is liable to him in equity. Therefore he gives a better reason, because, says he, it never was his intent to advance the lord, but his own blood. Therefore that is the reason; it would not be within the intention of that trust, that any besides the blood of the covenantor should take. Nobody can imagine the tenant intended to provide a trust to answer the lord's escheat. Mrs. Harding never thought of escheat I suppose;—but had it been suggested to her, “If you die without heirs that “ can possibly take your estate; would you rather have your “ friend, you have chosen to make your trustee, take it, or that “ it should go to the King?” She must have been a subject of more zeal than I can suggest, if she had said she would give it to the King.

As I am now stating the law and equity of escheats with regard to uses and trusts, I will here take notice of an objection that seems equally to affect the opinions of lawyers, with regard to the doctrine of uses and trusts; and that is the dilemma which was urged at the bar, as the basis of the equity in the present case, though I don't think it a necessary dilemma: *vis*. That the lord must have the estate by escheat, either on the death of *cestuy que trust* without heirs, or of the trustee without heirs discharged of the trust; but if he can't have it while the trustee lives, while there is a tenant, it would be monstrous, that the *cestuy que trust* should be prejudiced by putting the estate in the trustee's hands for the benefit of the family.

- [*179] *One part of this is a dangerous conclusion, the other is not. My answer is, that if the law be so that the lord shall in that

case take it discharged of the trust, I must suppose it no injury or absurdity at all. *Volenti non fit injuria*. The creator of the trust determines to take the convenience of the trust with its inconvenience. It is most certain, every man who creates a trust puts his estate in the power of his trustee. If the trustee sells it for a valuable consideration without notice, no Court can relieve the owner from this misfortune; it is the result of his own act; and yet that is as shocking a perfidy in the trustee as can be; but the Court cannot interpose, as it would affect the rights of others, of third persons. But I don't know it has been determined that it shall escheat, discharged of the trusts. I shall give no positive opinion upon it. So far I may say, that unless a trust can be distinguished from an use, the most learned judges say, the right comes as a reversion, failing heirs, and that the time of escheating is, when there is a want of a tenant, the right of the lord being paramount. The trust cannot be affected by it. 1 Co. *Chudleigh's Case* (x); the lord comes in the *post* and not in the *per* (y). Popham, *S. C.* (x), says, that is the reason why the law is so, and I don't doubt the law. But there is no occasion to give a precise opinion upon it till necessary. But I don't think this is at all a necessary dilemma: the lord may not be entitled on death of *cestuy que trust* without heir, because there is no equity, for he has his tenant as he had before. But possibly, there might be an equity in the other case against the lord; for if trustee died without heir, and the lord had the estate, this Court might say, You shall hold to compensate yourself for your rent and services, but we will embrace the rest for the *cestuy que trust*.

A difference was attempted to be made between uses and trusts. I have seen trusts invented for the blackest purposes in my experience, and to subvert the very constitution of this kingdom. But this is nothing but the abuse of both. But to try if there is or is not any difference between them, the best way is to define both: as, in order to shew the difference between one thing and another, 'tis usual to define the one and the other, and by comparing the definitions find the difference. Finch, l. 2, c. 22, fo. 22 b, says, an use is, where a man has any thing to the use of another upon confidence, that the other shall take the profits. He who has the profits, has an use. The other books say an use is neither *jus in re* nor *ad rem*, &c. Now what is a trust? A confidence for which the party is without remedy, but in a Court of equity. Lord Chief Justice does not state any difference in the metaphysical essence between an use and a trust, but that there was a difference in the law by which the one and the other was directed; and I think there is no difference in the principles, but there is a wide difference in the exercise of them. It was as much a principle

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(x) Fo. 122 a.

(y) The lord by escheat is *in* in the *post*; Harg. Co. Lit. 239 a, and. [n. 156] *ibid*. As to the *per*, the *per et cui*, and the *post*,

see F. N. B. 422, 467 (4to ed.); 3 Bla. Comm. 181; and 1 Roscoe on Real Actions, 88.

(z) 1 Co. Rep. 139 b.

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of this Court, that the use should be considered as the land, or as imitating the land, formerly as now; though the rules were not carried formerly so far, nor the reasoning nor directions (when they were less understood) as at present. To give a [familiar] instance: the elements and principles of geometry were the same in Euclid's time as in Sir Isaac Newton's, though in the latter's time the use of them was much enlarged. It was said, the difference consists in this: that equity has shaped them much more into real estates, than before when they were uses. As now, there is tenancy *per curtesy* of a trust; they may be entailed; and those intails barred by a recovery. But why? Not from any new essence they have obtained, but from carrying the principle farther, *quia equitas sequitur legem*: for, as between the trustee and the *cestuy que trust*, this Court had jurisdiction; and I think they should have equally extended in this Court the rules and principles of uses, as well as trusts. This therefore was the effect of the equitable jurisdictions growing to maturity. Lord Bacon says, they grew to credit and strength by degrees. He says, an use is nothing but a general trust, where a man will trust to the conscience of another, rather than to his own estate and possession.

[*181] That an use and trust are the same, seems adopted by all the great persons who have presided in this Court. *Gray* against *Gray*, 29 Car. 2 (a); Lord *Nottingham* in a case whether a purchase made in the name of the son was a trust or an advancement, held it the latter, and that there should be no constructive trusts: he grounds himself upon this observation; "All the books agree, that a feoffment to a stranger without consideration, raised an use to the feoffor by implication" (b). "How can this Court justify it to the world, if it should make the law of trusts differ from the law of uses, in the same case?" They thought they were so strictly bound by it, they could not depart from it. They act under rules and checks, *i. e.* a discretion put upon them. As in *Attorney-General* against *Scott* (c), Lord *Talbot* of same opinion. In *Goodwin* against *Winsmore* (d), Lord *Hardwicke* of same opinion. This Court has considered the trust, as between the trustees and *cestuy que trust* and those claiming under them, as imitating the possession; and much more than an use was considered in this Court; but not more than the Court would have modelled uses, if uses had existed at this day. I do not see why the same determination should not be of an use, as imitating the possession, as there is now upon trusts. Would it not be a bold stride to say, this Court has considered trusts as a mere nullity and notional; and that they are to be treated just the same, as if they continued in the seisin of the creator of them or the person for whom they were made? Rules of property are not to be questioned even by the Judges, while the people continue satisfied and acquiesce in them. None but the Legislature can

(a) 1 Ch. Ca. 296, Finch. 338.

(b) "But a feoffment to the son, without consideration, raised no use by impli-

cation to the father;" 1 Eden, 249.

(c) For. 138.

(d) 2 Atk. 525.

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alter them. Trusts have imitated lands according to the strength of this jurisdiction always. My objection to the claim in the information is, not that it is to have a trust executed as if it were land;—but it is to claim the execution of a trust, that does not exist. If there was a trust, I should consider it merely as an estate, and determine accordingly. But the creation of a trust can never affect the right of a third person. The trustee has the burden and the legal privilege. Can this Court say it is a nullity? and yet it must be so said, to take it from the trustee.—*Servetur ad inum*. But it cannot be said 'tis a nullity in that respect, as to a trust accepted. The *conveyance shall subject the trustee to all the fruits of tenure. Though he has continued subject to all burdens when the trust subsisted, yet now it is said, as Mrs. Harding is dead, you shall be considered so no longer. As between trustee and *cestuy que trust*, to say it is a nullity must be with this restriction, that he shall take no beneficial interest that the *cestuy que trust* can enjoy. But any other he may. And therefore in respect to members, sheriffs, coroners, the trustee was the person who had the right to exercise it; and the Legislature was forced to interpose, before the *cestuy que trust* could have or enjoy that valuable privilege (e).

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I can assign but one reason why that distinction between tenancy by curtesy and in dower has prevailed; and it is applicable to the reason of this case. I have heard the House of Lords was startled at the distinction, and they were told the opinion of conveyancers was so, and that, if it was altered, it might load purchasers with dower, who thought they had purchased free from it. And the Lords would not reverse the judgment, because they would not let it affect the right of a third person. Now it appears to me, that at law there can be no escheat, while there is a tenant *de jure*. In equity there could be none, while trusts were called uses, and a trust and an use are exactly the same. How then can I say, the lord shall lose his escheat, when any man for his own convenience puts his estate in trust. It seems, if I were to do so, that I should *give* law and equity, and not *pronounce upon* law and equity.

Two centuries have passed since uses and trusts have been admitted, and (f) I cannot find a *dictum*, that the Crown shall have an escheat of a trust: but I find in other books the contrary, and by one of the most learned Judges that ever adorned the profession; Hale, 247. Every writer of learning has transcribed and adopted this position, so that it is confirmed by them; *viz.* by attainder of felony of the feoffee, the lord shall have the land by escheat. Stanford P. C. 186. *Pine's Case*, 496 (g); Palmer, 176 (h).

(e) 7 & 8 W. 3, c. 25, s. 7.

(f) This passage should be as follows;
"Two centuries have passed since uses were
extinguished, and since trusts have arisen;

yet," &c. *MS. Serj. HILL*; 1 Eden, 252.

(g) Or *Pimb's Ca.*, Moore, 496.

(h) *Hiz's Ca.*, Hardr. 176; and not
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* In *Sir George Sandys' Case* (i), the Court had no doubt upon that part of the case applicable to the present; *viz.* upon forfeiture of the fee-simple. The doubt was, Whether the forfeiture should take place, on a term in gross or attendant upon the inheritance. 'Twas objected there, who should have the trust? The Court said, Sir George Sandys should hold the land discharged of the trust of the term, as in the case of a grantee of a rent dying without heirs. And this is an answer to an objection for want of right and title in the defendant. The grantee there had purchased a perpetual rent and paid for it; the grantor had sold it; the grantee dies without heirs; there's nobody to call upon the person in possession for the rent. The reason why he should hold it is, here is nobody to call upon him; therefore no man can have a better right than he. How came it not to be considered in that case, that it was a casualty, that should come to the Crown as *ultimus hæres*? Yet it never was; for confiscations are hard things, and contrary to the genius of a free country; and the law of England seems to have made a confiscation in no case, but where there is a vacant possession: And there 'tis for peace sake, and that quarrels may not ensue. But where a person is possessed of a thing, without getting it against law, he has a title. The judgment in *Sir George Sandys' Case* being an authority in point, great efforts are made to weaken the validity of it. Lord *Hale's* abilities have been questioned in equity. Then called a case of compassion; and that the family was concerned in it. That the contending party was the Crown;—that the *Attorney-General* could not drop the right, &c.—But Lord *Hale* determined on great principles of law; and I can't help remarking, neither bar nor bench were ever frightened at the ill consequences which might follow, which have been now mentioned. Perhaps they considered, that it was the act of the party himself. They might carve out what estates they pleased, and reserve the limitation in fee. Does this Court sit here to guard against the oscitancy, or inattention of conveyancers in making use of trusts, and not preventing an escheat to the lord? Wherever the King is not lord, his pardon would not signify; the escheat arises on the judgment. If the King [*184] *pardons the felon, what hinders him from suing his trustee? Attainder don't prevent his assigning his trust. 'Tis determined in outlawry it does not. 'Tis said, the King on a legal escheat shall be liable to the equity of redemption, and 'tis said to be held so by Lord *Hale* (k). But I don't know that has been determined. And I observe, though they agreed in opinion, they could not agree on the remedy, though they agreed in equity. I hope the Exchequer has (now) ascertained the remedy. I see an original equity impressed upon that case. The mortgage is made on condition. I would not have it under-

(i) *Ante*, p. 140.

(k) See *ante*, pp. 143, 149; and 2 Hawk. P. C. c. 37, s. 54.

stood that there's any equity for the subject, that the King is not equally entitled to; but I think the arms of equity are very short *against* the prerogative. 'Twas said, if a mortgagor die without heir, shall the mortgagee hold the land free? (I answer, shall it escheat to the Crown?) No, because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor, I shall not trouble myself about. I think the Crown has not an equity on which to sue a *subpœna*.

As to the claim of the heir *ex parte maternâ*, the estate is conveyed and the use executed in Page and Simons, and their heirs. A declared trust upon it to Mrs. Harding, her heirs and assigns, with a general declaration, which in my opinion operates no more than this, that, as between the *cestuy que trust* and trustees, they shall have the trust to no other use or purpose. Upon this, I concur with the Judges' certificate; that if no estate had passed to the trustee, or if that deed had never existed, the inheritance could not have descended to the heirs on the part of the mother.

Another question might have been put to the Judges, *i. e.* If an use by this new conveyance had been limited, and not a trust, whether it would have descended to the heirs on the part of the mother? But the law was clear and plain; and an use, whether declared or resulting, must ensue the nature of the land, and retain the same quality; and whether it be expressed *or resulting, makes no manner of difference. Therefore they did not encumber the Judges with that. It had been settled in *Martin* and *Strachan* (l), *Abbot* (m), and *Freestone* (n). 2 Roll. Abr. 780. Uses at common law, and trusts now, must ensue the nature of the land, as in the case of borough English and gavelkind lands (o), they must ensue the nature of those inheritances. In the case of a resulting use, the true reason is, that 'tis never out of the grantor. In the case of trust 'tis the same—'tis the old trust, therefore I think the trust would not go to the heir of the part of the mother; (in lands descended *ex parte paternâ*) which, without a re-conveyance, could never have a different descendible quality. In this case *primâ facie* it was considered, that nothing descended to the maternal heir, for the information says, "nothing descended to the heir of the mother's side."

But then it is said, if you will not make the deed of 1718 and fine a mere nullity, it alters the use, and that it vests an use and trust in Mrs. Harding as a purchaser. I wish I could find a ground to say the use is changed; but I cannot say it; because the way in which this bars the lord's right is not by *changing the use*, but by *bringing a tenant* on the land, which changes the lord's escheat; and though the old use is extinct,

(l) 2 Stra. 1179, 5 T.R. 107, n. See ante, 129, n. (f).

(m) *Abbot v. Burton*, Salk. 590, ante, 126, n. (e).

(n) *Godbold v. Freestone*, 3 Lev. 406, ante, ibid.

(o) *Fawcett v. Lord Lonsdale*, 2 Ves. Sen. 304.

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and no new one raised, yet that interposition will bar the lord of his escheat. But then it is said, if the old use is not altered, then the escheat takes place on its extinction, because 'tis engrafted upon it; when one fails, the other takes place. But that use may be determined and no new use raised, and yet the lord shall not have an escheat. Suppose Mrs. Harding had never executed this conveyance, and been disseised, and the disseisor died seised, or made a feoffment, and Mrs. Harding had died without heirs *ex parte paterna*, the old use would have been determined, and yet the lord would not have been any nearer his escheat; for if (p) the heir of the disseisor or the feoffee of the disseisor had been *in, the old use had determined, and escheat would not take place.

It may be said, there is a new use obtained by the disseisor by operation of law, which will bar the escheat. If that can be said, I can with a better grace say, here is a new estate acquired by the trustee, by operation of law, and his own conveyance. He has as much an use as a disseisor. There is no variance made in the use by Mrs. Harding. She has made a tenant to the estate. That tenant in my opinion is a bar to the lord's claim. I am therefore also of opinion, there is no alteration of this use. The consequence is, that the heir *ex parte materna* cannot be entitled to any part of the estate, except the mill and closes under the deed of 1713.

Original bill dismissed as to all the rest, and the information on the part of the Crown dismissed totally (q).

{ *Ex relatione Mri. Fazakerly,*
{ *Mediante Mro. Gascoyne.*

(p) For "if" read "in that case."

(q) Lord Loughborough observed, in *Williams v. Lord Lonsdale*, 3 Ves. Jun. 756, that "the only point determined in *Burgess v. Wheate* was, that the Crown, entitled, as it was supposed, by escheat upon the death of the *cestui que trust*, had not a title by *subpoena* in Chancery to make the heir of the trustee, having merely a legal estate, convey; that there was no equity for that Court to exercise jurisdiction." The point there determined was, that the heir of the trustee of a copyhold had no

equity to compel the lord to admit him. That case comes the nearest to the principal one of any that have been determined since. The reader may also consult the cases of *Middleton v. Spicer*, 1 Bro. C. C. 201; *Barclay v. Russell*, 3 Ves. Jun. 424, both of which were cases of *vacant possession*, as observed by Mr. Eden; and *Walker v. Denne*, 3 Ves. Jun. 170: all of which are critically examined and compared with the principal case by the learned Editor in 1 Eden, 259.

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MICH. TERM,—33 GEO. II. 1759.—K. B.

THE KING v. The Corporation of CARMARTHEN.

S. C. 2 Burr. 869.

No information
in nature of
quo warranto,
against a corpo-

SERJEANT Nares moved for an information in nature of a *quo warranto* against all the Corporation of Carmarthen, by name, to shew why they acted as a body corporate. The Court

observed that before the stat. 9 Ann. (a), all informations in nature of *quo warranto* were filed by the Attorney-General, and that this statute extended only to *officers in* corporations, and not to corporations themselves. Lord Mansfield, C. J., put this question: Whether an informer has a right to come into this Court, to demand a trial whether or no any corporation in the kingdom is dissolved? Whereupon the Serjeant waved his general motion, and moved for informations against particulars, for acting as members of the corporate body (b).

THE KING
"Corporation of
CARMARTHEN.
ration, acting
as such, but only
against individual members.

(a) C. 30, s. 4.

(b) Upon a rule to shew cause, why an information in nature of a *quo warranto* should not be exhibited against the defendant, to shew by what authority he claimed to be fellow of Trinity-hall, Lord Mansfield said,—“The objection is strong, that no such information can be filed here under stat. 9 Ann., and that all other informations ought to be filed by the Att.-Gen. But those informations did exist before the statute of Anne. Every college is a corporation in itself, and altogether they form one corporation in the University in gross.

If a person shew here a grievance which wants to be remedied, this Court will find a remedy.” But the rule was discharged on the merits; *R. v. Gregory*, 4 T. R. 240, n. (a). Such an information upon this statute does not lie against the mere claim of one, who, though elected, never was admitted; nor against a member, till removal by the corporation; *R. v. Pousenby*, 1 Ves. J. 1, 1 Lord Ken. 1, Say. R. 243, 2 Bro. P. C. 311 (2d ed.) See also Bac. Abr. Information (D), and *R. v. Lathorp*, post, 468.

HURST v. The Earl of WINCHELSEA.

S. C. 2 Burr. 879; 2 Ld. Ken. 444 (c).

THIS was a case stated from Chancery for the opinion of the Court of King's Bench, and appeared to be this,—Thomas Herbert, by will duly executed, devised to his wife Elizabeth all his lands, &c. in fee-simple.—Elizabeth (on his death) married a second husband; but, previous to such second marriage, settled the said estates to use of herself for life; then to Thomas Herbert, her own son by the first marriage, for his life, and so on to his issue in strict settlement; then in remainder to such person or persons as she should by deed or will, notwithstanding any coverture, appoint. After the *second marriage she made a will, wherein she devised *all her estate* to said Thomas Herbert (charged with several pecuniary legacies), and died, living her second husband. Afterwards, Thomas Herbert died, *sans* issue and intestate. And the question was, Whether this estate should descend to his heir, *ex parte paterna* or *materna*? or whether the remainder in fee vested in him by descent from Elizabeth his mother, in which case it would go to the maternal heir; or whether it vested by the devise, operating as an appointment under the settlement, in which case, Thomas Herbert would be a purchaser, and the lands would descend to the paternal heir.

The Court, after hearing two arguments, declared they should certify that it descended to the maternal heir of Thomas Her-

An appointment by will under a settlement operates as a common devise, and the appointee in fee-simple (if heir-at-law) is in by descent, and not by purchase.

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(c) Where the arguments are stated at length, and the wills and deed are inserted.

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bert; it being a known rule (*d*), that a common devise in fee-simple to an heir-at-law, gives him no estate at all, he being adjudged in by descent; and it having also been determined in the Case of the Duke of Marlborough and Lord Godolphin (*e*), in Chancery, that an appointment by will is subject to the same rules as a common devise (*f*).

(*d*) See *Allen v. Heber*, ante, 22, and cases there cited, and Harg. Co. Lit. 12 b, n. [63].

(*e*) 2 Ves. S. 61, 73—see also *Southby v. Stonehouse*, Id. 610; Fearnle C. R. 76 (8th ed.).

(*f*) S. P. *Bashpoole's* Ca., 2 Leon. 101. Mr. Sugden, in his *Treatise on Powers*, p. 328 (3rd ed.), observes, "that this is a very extraordinary decision. It may be right to hold that the instrument should operate as a proper will as to the words and general effect of it; but upon what solid principle a man can be held to take that by descent, which never vested, or had a chance of vesting in his ancestor, it is not easy to conceive. We may ask with Ld. C. J. *Willes*, 'Will any one say that any thing can descend to the heir, that did not vest in the ancestor?' *Willes*, 338. The grounds of the determination are quite foreign to the question. The principle of the decision cannot even be supported by

any plausible fiction, nor does policy require the adoption of it; for in the general run of cases it must be wholly immaterial, whether the appointee take by descent or purchase. It should be observed, that, in the case alluded to, the power was reserved to the person who made the settlement, and who was at that time seized in fee. It may not, therefore, be deemed a general authority, that in every case of a beneficial power, the heir of the donee, being the appointee, takes by descent, although the donee himself never had any interest in the estate; nor indeed was it acquiesced in as an authority upon the point it professed to decide; for the decree of Ld. K. *Henley*, in conformity to the judgment of K. B., was appealed from to D. P., and the appeal was afterwards compromised; 1 Ld. Ken. 465, 2 Burr. 882." See *Langley v. Sneyd*, 3 Brod. & B. 243.

GOODMAN v. GOODRIGHT (*g*).

S. C. 2 Burr. 873.

Executory devise to the heirs of A.'s body by a second husband, on failure of issue by the first now living, too remote a contingency, and therefore void.

ERROR from the great Sessions of Chester. In ejectment the case was as follows: One Mrs. Mostyn, on the marriage of her niece (and afterwards heir-at-law), Mrs. Wynn, with the Reverend Dr. Wynn, entered into articles, covenanting to settle (*inter alia*) an estate for life to Mrs Wynn, with remainder to the issue of that marriage in tail; reversion to herself in fee; whenever Dr. Wynn should have settled his own estate to the same uses. Mrs. Mostyn, by her last will, reciting the said articles, gives her equitable reversion in the premisses to the heirs of the body of Mrs. Wynn, by any after-taken husband; and for want of such issue, with remainder over to Ch. Lloyd in tail. The Doctor and Mrs. Wynn suffered a recovery after the death of Mrs. Mostyn, to the use of Mrs. Wynn in fee-simple; then Mrs. Wynn died *sans* issue, living the Doctor. The defendant (being her heir-at-law) entered, and the lessor of the plaintiff (being the remainder *man under Mrs. Mostyn's will) brought this ejectment (*h*), and obtained judgment in the Court below. The defendant brought this writ of error.

(*g*) There is a report also of this case from a note of Ld. Kenyon's in 2 Doug. 507, n. [3]. This note agrees in the material part of the judgment of the Court with Mr. J. Blackstone's account: see n. (i), *infra*.

(*h*) It was brought, as appears from the report in 2 Burr., on the demise of R. Williams and Annabella his wife, the only daughter and heir of Ch. Lloyd, against the defendants below, who claimed under the heir-at-law of Mrs. Wynn.

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Mr. *Norton*, for plaintiff in error, argued that the articles and will made only one conveyance (i); that thereby Mrs. Wynn had a life estate, with a remainder in tail; and that by the recovery it was barred, and an estate in fee acquired, which descended to the plaintiff in error.

Serjeant *Hewit*, for the defendant in error, insisted that in order to give Mrs. Wynn an estate tail in remainder, a particular estate for her life must be raised by implication in order to support it; but that no estate for life can be raised by implication, unless where there is no prior estate subsisting; which there is with respect to the reversionary interest. For he argued, that there being no heirs of the body of Mrs. Wynn by any second husband, that devise was void, and the devise to Lloyd took place as an estate tail (vested) in the reversion, expectant on the death of Mrs. Wynn, *sans* issue by the Doctor. This devise was in words *de præsenti*, and was immediate. There is therefore no necessity to imply a life estate; and if none be implied, Mrs. Wynn's contingent remainder in tail must fall to the ground, and that of Mr. Lloyd become vested.

Per Cur.—This case lies in a narrow compass, when stripped of unnecessary arguments. The whole comes to this question, Whether Mrs. Mostyn intended to give the reversion to her devisees, after the death of Mrs. Wynn, *sans* issue by the Doctor; or whether she intended to give them an estate in possession immediately, which is argued on behalf of the defendant in error; but she certainly meant the former, notwithstanding the words of the devise are in the present tense, “I give” (k), on which the whole of the argument is founded. This then being premised, let us consider the effect of this devise *in futuro* in two lights: 1. As a contingent remainder to the heirs of the body of Mrs. Wynn. To support which, a particular estate for her life *must be raised by implication; [*190] and then there would be an estate tail executed in Mrs. Wynn, which would have been barred by the recovery, and so the defendant in error would be defeated. But there is no need to determine this point: for we think, that if this cannot be considered as a contingent remainder, executed in Mrs. Wynn by implication of law, it must be considered,—2. As an exe-

(i) And then her life estate under the articles, uniting with the remainder in tail to her heirs-male under the devise, would give her an estate tail, so that the recovery would be well suffered. But the estate given by the devise could not be tacked to the estate given by the articles; *Moore v. Parker*, 1 Ld. Raym. 37, 4 Mod. 319; *Doe v. Fonnereau*, 2 Doug. 508, *per* Lord Mansfield. Neither could the devise to the heirs of the body of Mrs. W. give her an estate tail by implication; *Moore v. Parker*, *ut supra*; *Lanesborough v. Fox*, Ca. temp. Talbot (or Forest.), 262; *Jones v. Morgan*, 3 Bro. P. C. 323 (2nd ed.), *Fearne C. R.* 453 (8th ed.), by the Lord Chancellor,

and his opinion confirmed in D. P.; *Doe v. Fonnereau*, *ut supra*, where this point was not expressly determined, but may be understood to have been so; for though judgment was there given for the plaintiff, and this point was advanced on his behalf in argument, yet the Court ultimately gave judgment for him on another ground: which see, *infra*, n. (f).

(k) The distinction between devises *per verba de præsenti* and *per verba de futuro* is not now attended to; and both are considered a future devise, unless it clearly appear, that the testator meant nothing else but a devise to take effect *in præsenti*.

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cutory devise, first to Mrs. Wynn, then to Mr. Lloyd (l). And if so, they are both too remote, and therefore void. It is now settled, that you may entail by way of executory devise for a life or lives in being, and twenty-one years after. But this is a devise to the heirs of the body of Mrs. Wynn by her second husband (during the first marriage), on failure of the heirs of her body by the first; which may last for a longer period of time in suspense than the law has ever yet allowed. And being void, the reversion descended to Mrs. Wynn, as heir-at-law (m).

Judgment reversed *per tot. Cur.*

(l) This statement does not appear very accurate: it seems from comparing it with the report in 2 Burr. that it should be—"That if the devise to the issue of Mrs. W. by any other husband be void, the limitation to Ch. Lloyd in tail cannot be considered as a contingent remainder: and if it be considered as an executory devise, then not being to take place till after an indefinite failure of issue of the body of Mrs. W., it is too remote, and therefore void." And from 2 Doug. 507, n. [3], it appears, that the decision went upon the alternative, either of the niece having taken an estate tail by implication, or of the first devise (to the heirs of the body of the niece by any other husband) being too remote, and, of course, the second. The Court thought it unnecessary to determine whether the niece took an estate tail by implication. Lord Mansfield said, "The whole of the case comes to this: whether Mrs. Mostyn intended by the devise to give to the heirs of the body of her niece by a second husband the remainder, reversion, or estate (whatever it is called), after the deaths of herself, Dr. Wynn, and Mrs. Wynn, and failure of issue between them: or whether she meant to give an estate in possession to the issue of Mrs. Wynn by a second husband?" His Lordship therefore (being clear that it was not an immediate devise) put the case entirely on the remoteness of the first devise. Upon this part of the case Mr. Fearn says—"I observe the Court delivered no express decisive opinion as to the validity of the limi-

tation to the heirs of the body of Mrs. W. by any other husband, taken as a future devise; but it must be inferred from the judgment, when compared with the words of Lord Mansfield, that the Court were inclined to avoid admitting the validity of that limitation; for Lord Mansfield said, 'And supposing the devise to the issue of Mrs. Wynn by any second husband to be void, the limitation to C. L. could not take place as a contingent remainder.'" His other observations are too long to be inserted here; and therefore the reader is referred to the learned treatise itself; F. C. R. 458 & 534: see also *Harris v. Barnes*, *post*, 643.

(m) See *Doe v. Fomereau*, 2 Doug. 487, and the notes to that case, which is well worth very attentive perusal. That case was very similar to the present one: and there the Court at one time considered the devise to the second son, after a devise to the heirs male of the body of the first, void, (no particular estate being given to the first son by the will): but upon further consideration they gave judgment for the second son, on the ground, that the limitation to him was a good executory devise, "if Thomas the first son at his death leave no issue male then living." As to the distinction between "leaving no children living at the death," and an indefinite failure of issue, see *Porter v. Bradley*, 3 T. R. 146, and *Doe v. Webber*, 1 B. & A. 713, where all the authorities are referred to; and also *Wellington v. Wellington*, *post*, 645.

LUKE v. LLOYD [or LYDE].

S. C. 2 Burr. 882.

In case of loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which was performed.

ACTION by the master of a ship against a merchant for freight (n). The ship was bound to N. but taken by a French privateer; and carried into Plymouth afterwards, being retaken by an English man of war, who had *half* the goods for salvage, she not being retaken within ninety-six hours. The voyage to

(n) The plaintiff declared on an *indebitatus assumpsit*; 7 T. R. 382; Abbot, 324, n. (r).

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N. is usually performed in twenty-one days, but the ship was taken on the seventeenth. On her return, the merchant (without (o) the concurrence of the master), took away the remainder of his goods after salvage paid; and the question was, whether any, and what freight was due for this imperfect voyage?

Per MANSFIELD, C. J., *et Cur.*—The established rules in such cases are the following:

*1. If a ship is disabled from pursuing her voyage (p) by any fortuitous calamity, the master has his option to refit the ship within a reasonable time, or hire another. If the merchant refuses to let him hire another, the merchant must pay him the whole freight (q). [*191]

2. 'Tis nothing to the master, whether the goods saved are damaged or otherwise (r); for an average freight is due upon the whole: and the merchant cannot pick and choose, but must take to the whole, if he takes to any. But the merchant may abandon the whole, though not part, in case he thinks them not worth the freight; for,

3. In case of calamity, the merchant is only to pay freight for the goods saved (s).

In the present case, some freight is certainly due, but not the whole freight; for the master acquiesced in the merchant's conduct, who took away his goods; and he did not offer to hire another ship, which he might have done. He has therefore made his election, not to furnish the merchant with another conveyance; and can only be paid rateably, for so much of the voyage as was performed. Again, only half of the goods were saved, the other half being due to the recaptors; therefore the rateable freight is only due for a moiety. The law in these cases is laid down agreeably to these rules in the Rhodian Law; Consolato del Mare; The Laws of Oleron, sect. 4; Usages and Customs of the Sea (in French); Rockii Notabilia de Navibus, Num^o 81, edit. 1655; Ordonnances, Louis XIV. A. D. 1681, par M. Colbert, art. 18, 19 (tit. 3), 21, 22; and many more authorities than I (Lord M.) choose to mention. What profit the merchant may make of the goods is totally immaterial to the freight; for that becomes due before the goods are sold.

*Therefore let there be judgment for the plaintiff, with da- [*192]

(o) *Quære*, if this passage should not be "with the concurrence of the master."

(p) But if the ship be captured before breaking ground, no freight is recoverable; for the inception of freight is breaking ground; *Curling v. Long*, 1 Bos. & Pul. 636; see *Birley v. Gladstone*, 3 M. & S. 203.

(q) *Lutwidge v. Gray*, Abbot on Shipping, 316 (4th ed.).

(r) *Shields v. Davis*, 6 Taunt. 65: see also *Ward v. Felton*, 1 East, 507.

(s) "As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total, where part of the property is

saved, and the owner takes it to his own use. Where the value of the goods was restored in money, which is the same as the goods, freight is certainly due *pro rata itineris*:" *per* Lord Mansfield in *Baillie v. Moudigliani*, Park's Ins. 90 (ed. 1817). In that case, the further conveyance of the goods was prevented by the act of a Court having competent jurisdiction; but where it is prevented by an act of the ship-owners themselves, to which the owner of the goods neither actually nor virtually consents, the former is not entitled to freight *pro rata*; *Hunter v. Prinsep*, 10 East, 378, which see, and cases there cited.

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mages equivalent to the freight of one moiety of the goods, for part only of the voyage, viz. in the proportion of seventeen to twenty-one (£).

(£) In *covenant* on a charter-party, where the freighter covenanted to pay freight for goods *delivered at A.*, freight cannot be recovered *pro rata itineris*, if the ship be wrecked at B., though the freighter accept his goods there. *Per Lawrence, J.*; "When a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another; and having performed the voyage, he is then entitled to his freight: but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him, nor is he entitled *pro rata*, unless under a new agreement. Perhaps, the subsequent receipt of these goods might have been evidence of a new contract between the parties: but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at A.;" *Cook v. Jennings*, 7 T. R. 381; *Liddard v. Lopes*, 10 East, 526, 8. P.; there Lord Ellenborough said, "The acceptance of the goods was the very substance of the new implied contract in *Luke v. Lyde*." So, where the plaintiff

contracted to carry the defendant, &c. from D. to F., but the ship was brought into an English port by a ship of war, and the cargo condemned, and proceedings were still pending against the ship, but the defendant had been liberated and his goods restored: it was held, that whatever the plaintiff's right might be to recover passage-money *pro rata itineris* if the ship were restored, yet pending the proceedings the action could not be maintained; and *Le Blanc, J.*, said, "The footing on which the case of *Luke v. Lyde* was put, was, that though the master could not recover on the original contract, which was not performed; yet that he might recover upon an implied *assumpsit*, for a benefit already conferred on the defendant; which in that case was implied, from the acceptance of the goods by the defendant at the port into which they were carried;" *Mulloy v. Backer*, 5 East, 316. See *Ritchie v. Atkinson*, 10 East, 295. Where the freighter covenants to pay freight rateably at different periods, see *Smith v. Wilson*, 8 East, 437; *Gibson v. Mander*, 3 B. & A. 17; and *Hume v. E. I. Comp.*, post, 291.

CHINHAM v. PRESTON.

S. C. BARR. S. C. 486.

Marriage contrary to the late act is void, *quoad* settlement, and the woman cannot be removed as wife.

MOTION to quash an order of Sessions, confirming an order of two justices, for the removal of Edward Young and Rebecca his wife, and a young child, from Preston to Chinham, as the place of the husband's last legal settlement. It appeared, that Edward Young was since the late act (v) married to Rebecca when he was under age, and without banns or licence. Wherefore it was argued, that she could not be removed as his lawful wife, the marriage being void. On the other hand it was contended, that the marriage was not void, but only voidable, *quoad* the settlement of the parties.

Lord MANSFIELD, C. J.—There is this plain distinction between things void and voidable: where the law makes a thing void for the benefit of the parties concerned, they may waive that advantage if they please. But the marriage act is avowedly made *against* both the contracting parties, (*Foster, J.*, added, and *against* the innocent children too), and therefore they shall not waive the disabilities of it at their own option; the

(v) 26 G. 2, c. 33: see 4 G. 4, c. 76, and 5 G. 4, c. 32.

marriage is void and null to all intents and purposes, even though the parties should afterwards agree to it, wherever the fact appears directly contrary to the statute (u).

Order quashed *per tot.* Cur. as to Rebecca and the child. Confirmed as to the pauper Edward.

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(u) So a marriage by license between two illegitimate children, being minors, without consent of parents or guardians, was held *void*; and Lord Mansfield said; "Before the 26 Geo. 2, was passed, by the laws then in being, if a man and woman made a contract in private *per verba de presenti*, and kept it a secret, and afterwards there was a public marriage solemnized by either of them, and issue born of that marriage, nevertheless the private contract took place of the subsequent marriage; because the canon law compelled a strict observance of these contracts, and decreed them to be solemnized in the face of the Church;" *R. v. Hodnett*, 1 T. R. 96; *Weld v. Chamberlaine*, 3 Show. 300; *R. v. Brampton*, 10 East, 282, S. P. And though it was at one time thought, that the marriage of an illegitimate minor

with consent of the putative father was valid; *R. v. Edmonton*, 2 Bott, 85 (ed. 1793): yet in the case of *Horner and Liddiard*, in the Consistorial Court, where consent had been given by the mother of the bastard, Sir W. Scott decided, that, in such a case, consent could only be given by a guardian lawfully appointed by the Court of Chancery, and without it the marriage is a *nullity*: Reported by Dr. Croke; 1 Nolan's Poor L. 264 (ed. 1814); 4 Chetw. Burn's Just. 249 (ed. 1820). This decision was confirmed in K. B. on argument, by three Judges, *Grose, J., diss.*; *Priestley v. Hughes*, 11 East, 1. The consent, now requisite, is regulated by 4 G. 4, c. 76, s. 16.

As to publication of banns, see *R. v. Billinghamurst*, 3 M. & S. 250, and notes.

SMITH v. FRASER.

IN trespass and assault, the plaintiff made affidavit before *Foster, J.*, to hold the defendant to bail; on the flagrant circumstances of which, he directed 200*l.* bail to be given. *Now Mr. Stow moved on a counter affidavit to lessen the bail. But the Court said, it was a new motion, and if the plaintiff's affidavit was false, he must be indicted for perjury, as in the common case of affidavits for special bail (w).

No counter affidavit allowed to lessen bail in assault.

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(w) *Imley v. Ellesfen*, 2 East, 453; *Davies v. Chippendale*, 2 Bos. & P. 282; *Echlin v. Hartop*, post, 886.

HILARY TERM,—33 GEO. II. 1760.—K. B.

FOXCRRAFT v. DEVONSHIRE.

S. C. 2 Burr. 931.

INDEBITATUS *assumpsit* by Foxcraft, assignee of one Satterthwaite, a bankrupt, against Devonshire, a factor, for 5000*l.* The bankrupt, after the act of bankruptcy committed, but before commission issued, had consigned goods to that amount to Devonshire's house, who sold the same; but [he] had paid several bills of exchange drawn by Satterthwaite (some of

Payment of bills to support the credit of a declining trader, without notice of any act of bankruptcy, not fraudulent.

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which were paid before, some after, the consignment), equivalent in value to the goods consigned, for which he demanded an allowance. The Jury found a verdict for the plaintiff, and now, upon motion for a new trial, *Noel, J.*, who tried the cause at the last Lancaster assises, certified that there was evidence that the defendant strongly suspected the decline of Satterthwaite's affairs, and that he paid these bills to support a false credit in his principal; and that thereupon the Jury found their verdict upon the footing of fraud, agreeably to his sentiments and directions.

- [*194] *It was argued for the defendant, by *Morton, Aspinall, and Wynn*, that upon *indebitatus assumpsit*, which is an action founded upon a contract, the plaintiff shall not be allowed to affirm the contract in part, by availing himself of the consignment, and to disaffirm it in part, by alleging a fraud in the sale; *Geasborough and Wilson; Thomas and Whytt*, 1 Geo. 1, *coram* Lord *Macclesfield, C. J.*; *Wilson and Porter*, 3 Geo. 2; *Dillon and Hyde(a)*, M. 1749. The assignees have their election, and may either consider the defendant as a wrongdoer in an action of trover, wherein no set-off is admitted; or they may consider him as a right-doer, in *indebitatus assumpsit*, and call him to account upon the breach of contract, and then they must allow the whole of the account. In either case the defendant would be safe. For in trover, a tortious conversion must be proved; but none such appears in this case. He came to the possession of the goods legally; the custody was legal; the sale was legal; as a servant and by direction of the principal. In the present action, the defendant was indisputably entitled to an allowance of such part of the bills, as were paid before the consignment. For the statute 19 Geo. 2(b) extends to this very case, of money paid in a course of trade: *Collet and De Gols*, Ca. temp. Talb. 65; *Brown and Williams*, 2 Ch. Cas. 135. When a purchaser *bonâ fide* has a legal estate vested in him, before the bankruptcy of the vendee(c), and afterwards advances more money to the bankrupt, *sans* notice of the act of bankruptcy, the Court will not enquire strictly into the time of lending it, so as to injure him; though an original purchase after the act of bankruptcy committed, and within five years before the commission issued, is void. So too in the present case, the defendant having once got a legal lien on the goods, shall be allowed his whole disbursements on the bankrupt's account. There is great difference between a merchant and factor, and two independent traders. 2 Mod. 242, *Myers and Soleby*; Action will not lie against a servant acting in obedience to his master's commands, unless the command be to do an *apparent* wrong. If a master, who has committed a secret act of bankruptcy, sends his servant to market with cattle, and he sells them, shall he be accountable to the as-

(a) *Villain or Billon v. Hyde*, 1 Atk. 126, 1 Ves. Sen. 326.

(b) C. 32, s. 1. Payments by or to a

bankrupt are now protected by st. 4 G. 4, c. 16, s. 82.

(c) *Vendor?*

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*signees in trover; or if he pays that money by his master's order, shall he be liable to *indebitatus assumpsit*? The case is the same at present. All dealing by factorage or commission must be at an end, if, by relation and fiction, all consignments after a secret act of bankruptcy must be void, and make either the factor a wrong-doer and subject to trover, or accountable to the assignees for the value, though paid in a course of trade. Though by the Judge's report we are precluded from arguing the circumstances of fraud, yet whether the whole of the case be for us or no, if we are entitled to any allowance, as we certainly are to some, we ought to have a new trial; since no allowance has been made at all.

Norton and Yates for the plaintiff, argued, that the finding of fraud has contaminated the whole case of the defendant, so that he is entitled to no favour. That *assumpsit* is a better and more equitable action than trover, as it admits a set-off and prevents a circuity of actions. That the cases cited only prove, that a man cannot bring *assumpsit* for part of the goods, which ratifies the contract; and trover for the residue, which supposes a wrong done. That an *assumpsit* does not ratify the whole contract in the manner contended for, but *sub modo*; it affirms the act of sale, but does not affirm all other transactions between the factor and bankrupt. The lien of a factor is only on the goods of his principal, but the consignment was after the act of bankruptcy, when they were no longer *his* goods. Suppose it before; yet it would be of dangerous consequence if, after an act committed, a bankrupt is allowed to draw bills on his factor or agent, or increase a lien which they had before.

Per Cur. MANSFIELD, C. J., (*apres*).—The question in this cause was, whether the defendants as factors were to be allowed to retain these goods as a satisfaction for their commission and expenses, and also for the bills drawn by the bankrupt, or only for the former. The plaintiff started a preliminary point, whether the transaction of the bills was or was not fraudulent. The jury found it fraudulent; and though the jury might judge wrong therein, yet if upon the whole case the true justice is evidently with the plaintiff, the Court will not grant a new trial (*d*). * But we are not clear, that this action of *indebitatus assumpsit* does not affirm the whole transaction. [*196] It plainly allows the factor a lien on the goods for his commission and expenses, and why not for money by him advanced on the credit of the trade? Besides, it may be questioned, whether, as the goods have been sold and turned into money, which made the factor a debtor, he is not within the statute 1 Jac. 1, c. 15, as having (by paying the bills) paid his own just debts to the bankrupt, without notice of his actual bankruptcy. Wherefore we have no reason to suppose, that, abstracted from this circumstance of fraud, the true justice of the case is with the plaintiff. This makes it necessary to consider the fraud

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alleged. We do not think there was a fraud proved, sufficient to found the direction of the Judge and the verdict of the jury. Fraud is sometimes a mere matter of fact to be determined by a jury; sometimes it is a conclusion of law from facts agreed on between the parties. The fraud here alleged is of the latter kind. The evidence of fraud in this case are letters sent from the factor to the bankrupt, which prove (according to the report) that a false credit was given to the bankrupt, to prevent an open bankruptcy. Had the transaction been after notice of the act of bankruptcy committed, the Judge's direction would have been agreeable to the terms of the statute 19 Geo. 2; but as this was before notice of the act done, the direction (we all think) was a mistake. It is no act of fraud, for a factor or any person whatsoever to advance money to another, to keep off an act of bankruptcy. On the contrary, it is a generous, humane, meritorious act. Men in trade may often be liable to failures, from accidents abroad, though their own substance be extremely great, unless some friend will step in to lend them a helping hand for the present. Nothing is more common among merchants, than for a fictitious credit to be kept up, by drawing and redrawing bills; yet these were never denied to be real debts, and are *always admitted as such. Nor is the case of a factor in the least more unfavourable than another's; they are liable to great impositions from the merchant, who may consign his goods differently from what he promises to do; so that they are not altogether so safe as it has been argued they are. On the whole, there cannot be a greater paradox, than that it should be a fraud for a man to lend his money, with no other view but a chance of being repaid it.

Noel, J., has been consulted with, and agrees that the matter now appears in a different light than at the trial, and concurs with us, that these facts were not sufficient to ground a conclusion of fraud. Unless there be a new trial granted, the defendant must resort to equity, because legal allowances were not made to him at the trial, as was done in the case of *Dillon* and *Hyde*. Therefore, *per tot' Cur.* Let there be a new trial on payment of costs (e).

(e) A trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance money thereon, and, accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money: held that he was answerable to the assignees for the value of the goods. Lord Kenyon: "We ordered the second argument not on account of any difficulty that this case presented to the Court; but the case of *Foxcraft v. Devonshire* was pressed upon us on the former argument as a decision directly in favour of the defendants; and that case is involved in so much obscurity, that, when it was cited,

we did not immediately see how far it applied to the case before us: but, having since had an opportunity of examining that case, we find that there was no point there decided, that will clash with our opinion in this case. It appears that that case was not thoroughly understood on the first trial; and all that was there judicially decided by this Court was, that a new trial ought to be granted, in order that the case might be more fully investigated. It is true, indeed, that some expressions there dropt from Lord Mansfield favourable to the argument of the defendants in this case; but even if such had been his judicial opinion, we must have examined the grounds of it; and after paying every attention that is due to the opinion of so

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great a man, we must have decided according to the provisions of the statutes alluded to; *Copland v. Stein*, 8 T. R. 199. A factor, who becomes surety for his principal, has a lien on the price of the goods sold by him for his principal, to the amount of the sum for which he has so become surety: *Drinkwater v. Goodwin*, 1 Cowp. 251, in which case the factor had sold the goods before any act of bankruptcy, but had not received the money till after action brought. So where a principal informs his factor, that he intends to consign a ship to him for sale, and draws bills on him, which the factor accepts, the latter has a lien on the proceeds, as well for disbursements, as for acceptances, whether paid or outstanding; *Hammonds v. Barclay*, 2 East, 227. Where A. a factor having sold goods of B. in his

own name to C., the latter, without paying for these goods, sent another parcel of goods to A. to sell for him, never having employed A. as a factor before: C. then became bankrupt, and his assignees claimed the goods sent by him to A., and which still remained unsold, tendering the charges upon those goods. A. refused to deliver them up, claiming a lien upon them for the price of the former sold by him to C., there being a balance then due from B. to himself: it was held by three Judges against the opinion of Lord Alvanley, C. J., that the assignees were entitled to recover; *Houghton v. Matthews*, 3 Bos. & Pul. 485. See *Walker v. Birch*, 6 T. R. 258; *Hudson v. Granger*, 5 B. & A. 27; and *Godin v. London Ass. Co. ante*, 103; *Green v. Farmer, post*, 651.

WILLIAMS, on Demise of JOHNSON, v. KEEN, Casual Ejector,
MORGAN *et al'* Tenants in possession.

NINE ejectments were delivered in the county borough of Carmarthen (*f*): Serjeant Nares moved (seconded at his request by self and others) for leave (*g*) for the defendant to plead to the jurisdiction of the Court of King's Bench, on the authority of a case of the like kind moved by Mr. Morton, H. 31 Geo. 2, *Johnson* on demise of *Williams* against *David*. The common practice of the Court is to receive motions for judgment against the casual ejector *nisi*, &c. after the term is ended; and then, upon the common rule, the new defendant has no opportunity to plead to the jurisdiction, or to move for

Leave to plead
to the jurisdiction
in ejectment.

(*f*) Probably the county borough of Carmarthen has an exempt jurisdiction. "Exempt jurisdiction is this, and was granted to cities or towns corporate for the benefit of trade; it was a grant to the freemen of such a city or town, that they should not be impeached out of their city or town, and this grant was good, if there were a Court in the city or town to hold plea of the matter. And if such inhabitant, in that case, be impeached in any other Court, he shall plead this franchise to the jurisdiction; and if he were sued below, he might have a *certiorari* and remove it up; for the privilege of being sued no where else being for his advantage he may waive it;" *per Holt*, C. J., in *Crosse v. Smith*, 12 Mod. 644, 3 Salk. 79: it is a grant to a city, that the inhabitants shall be sued within the city and *not elsewhere*, and nobody can take advantage of it, but the defendant; *S. C.* 3 Ld. Raym. 837; Bro. Abr. *Consuance*, pl. 45, S. P. See also the Case of *Cambridge University*, 10 Mod. 126. In all personal actions,

whether local or transitory, if there be no plea to the jurisdiction, the Courts of Westminster Hall may hold plea thereof;" *per Lee*, C. J., in *Chapman v. Mattison*, Andr. 198. But this is to be distinguished from a grant of consuance of pleas to the lord of a franchise, of which he only can take advantage, by putting in his claim of consuance; 2 Ld. Raym. 836. As to which, see *Kendrick v. Kynaston, post*, 454.—Vin. Abr. *Consuance*, (A 2).

(*g*) The tenant in possession cannot plead to the jurisdiction without leave of the Court; *Thrustont v. Holdfast*, 1 Barnard. 352, 365; *Davenport v. Jackson*, Andr. 368. An affidavit of the truth of the plea is necessary; *Hatch v. Cannon*, 3 Wils. 51; *Doe v. Roe*, 2 Burr. 1046. The plea of ancient demesne, which is a plea to the jurisdiction, must be pleaded within the first four days of the Term; *Denn v. Fenn*, 8 T. R. 474; but the Court will allow it to be filed *de bene esse*, pending a rule *nisi* for permission to allow the plea so filed; *Doe v. Roe*, 10 East, 523.

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leave so to do. Rules to shew cause were granted, and afterwards made absolute.

* (Qu. Whether regularly the motion should not have been, "that *the tenant in possession, when made defendant*, may have leave, &c.;" for the rule now granted seems only to affect the casual ejector, the only then defendant.)

THE KING v. GIBSON.

Reason why the defendant must appear in Court, when an order of bastardy is quashed.

MR. Norton moved to quash an order of bastardy, which being indefensible was accordingly done; the defendant entering into a recognizance to abide the order of the sessions below; which was the reason (the Court said) why the personal appearance of the defendant was in these cases always required (h).

(h) *R. v. Matthews*, 2 Salk. 475; *R. v. Price*, 6 T. R. 148; *R. v. St. Mary's*, Nottingham, 13 East, 57, n. (a), acc.

GARDINER v. CROSDALE.

S. C. 2 Burr. 904.

On an action against insurers for a total loss of ship, plaintiff may recover for a partial loss.

ACTION on a policy of insurance made on a ship trading to Greenland, which insured her against all perils, ice only excepted. She was damaged in a storm; upon which the owners broke her up at Bergen, and then brought this action against the insurers for the total loss. The jury found a verdict for the plaintiff, with 20*l.* damages, for a partial or average loss.

Morton moved to set aside the verdict, and to enter up judgment as in case of a nonsuit; because (he argued) the whole declaration is substantive, the total loss is the gist of the complaint; and therefore, unless the case be wholly proved, the plaintiff must be nonsuit. *Dean* against *Dicker*, Stra. 1250; insurance on goods in the Dursley galley, which was taken by an enemy, and cut out of port eight days afterwards. Plaintiff brought action for the total loss. It was insisted for the defendant, that as only salvage was to be paid, therefore only an average loss could be recovered for; which was not within the declaration. Chief Justice said, the plaintiff must recover in the present case; but it might have been otherwise, had the ship been retaken before it was carried *intra præsidia* (i).

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* *Aston*, on the same side, cited *Horn* and *Chandler* (k), and *Hamilton* and *Veere*, 2 Saund. 169. If a person declares that

(i) But that was an insurance, interest or no interest; and the Chief Justice held that the plaintiff ought to recover for a total loss; for his was a wager upon a total loss in the voyage, and there had happened one; for the being carried into port

and detained eight days makes one. But such insurances are now illegal by 19 G. 2, c. 37. See *Hamilton v. Mendez*, post, 276.

(k) 1 Mod. 271, 2 Keb. 687, 710.

he lost his apprentice, *per quod servitium amisit pro residuo termini*, if he recovers for the whole remaining term, when part of it is still to come, it is bad.

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E. Harvey on the same side.—Had judgment gone by default, the defendant would have admitted all the declaration, and therein the total loss, for which only the Jury could have assessed damages on a writ of enquiry, and not for an average loss.

Lord MANSFIELD, C. J.—This point of a partial loss was resorted to, late in the trial, after I had delivered my opinion, that the plaintiff could not recover for a total loss. The defendants contended, that no recovery could be had for a partial loss on this declaration. I gave no opinion, but directed a verdict for a partial loss, subject to the opinion of the Court; and the Jury assessed damages less by half than what was proved. I can hear of no determination upon this point. It therefore stands upon principles. And I think a recovery may be had for a partial loss. This is an action on the case, which is a liberal action; a plaintiff may recover therein whatever in justice he ought, consistent with the grounds of his declaration. He may recover less than he lays, but not more. The action is grounded on the policy of insurance, and the damage that has arisen to the ship. As to the totality or partiality of the loss, that is only material in respect of the quantum of damage: The ground of the action is upon the perils within the policy. It may be said, that the defendant does not come prepared to make a defence against any thing, but the total loss laid in the declaration. But he should come prepared to say, first, Whether he signed the policy; and secondly, Whether any or but little loss accrued. The contrary doctrine would introduce great inconvenience, by making distinct counts requisite for every possible species of damage, and every possible quantum of loss. I therefore think the plaintiff on such a declaration may recover either the total laid, or any part of it.

DENNISON, J.—There are many actions wherein nothing can be recovered but for a total loss; but this is not one of *them. [*200] This is an action for damages, in which the plaintiff shall recover *pro tanto*, according to what he proves. In an action of waste for pulling down a whole house, a man may give evidence of pulling down part of it. It is a mighty clear case.

FOSTER, J., *accord.* WILMOT, J.—In all actions on the case, the substance of the count is damage assigned; the total or partial loss is only the measure of that damage. On a writ of enquiry, the plaintiff could have recovered for no more than the damage proved; and if he had not proved the whole loss, he must have recovered for what he did prove (*l*).

The *postea* was delivered to the plaintiff.

(*l*) As to proceedings on policies of insurance, see Park's *Ins.* 592 (ed. 1817).
See also 2 Doug. 732, *Grant v. Astle*, *n*.

STRONG v. TEATT, [Lessee of MERVIN.]

S. C. 2 Burr. 912.

Words may be supplied to restrain the generality of a devise (so as to except a reversion), if the intent of the testator can be collected from other parts of his will.

ERROR from King's Bench in Ireland (m). On ejectment, the Jury found a special verdict, that by settlement, 22d December, 1711, Audley Mervin, on the marriage of his eldest son, Henry, with Mary Tichburn, conveyed lands of 1800*l. per annum*, in Tyrone, in trust for himself for life, remainder to Henry for life, remainder to the first and other sons of the marriage in tail male, reversion to himself in fee. Audley being also seised in fee of other lands in Meath and Tyrone, of 500*l. per annum*, and having three younger sons, Audley, James, and Theophilus, and four daughters, he, in 1717, made his will, beginning thus, "And as to *all my worldly estate*(n), &c., and then devises to his wife, Olivia, by special descriptions, the last mentioned lands in Meath and Tyrone, and "also *all other his lands, tenements, and hereditaments* in "Meath and Tyrone, whereof he was seised in fee-simple; to "the use and intent, that his wife might take thereout an annuity of 100*l.* for life, and should raise by sale, &c. so much "money as would pay the debts which should exceed the "value of his personal estate; and if any remain unsold, &c. "then with remainder to the use of his sons, Audley, James, "and Theophilus, successively for life, and to their first and "other sons respectively in tail male; remainder to his daughters as tenants in common in tail; remainder to *two of his "nephews in fee. Proviso, that if Henry and Audley die "without issue in the life-time of James, so that the estates "settled upon Henry in 1711, shall come to James, the lands "devised by will shall go over to Theophilus." The question was, Whether the reversion of the settled estates by the deed of 1711, passed under this will to the devisees, or whether it descended to the heir at law. In Easter Term, 1759, judgment was given in the Court below, that it passed by the will, and the alienee of the heir at law brought this writ of error (o).

Knowler, for the plaintiff in error, argued, 1. That the testator never intended to devise this reversion by will, as he distinguishes his *settled* estates from the lands *devised*. In

(m) At that time a writ of error lay from K. B. in Ireland to K. B. in England, and thence to Dom. Proc.: but by 23 G. 3, c. 28, s. 2, no writ of error or appeal from any Courts in Ireland shall be received by any Court in Great Britain. Since the Union, however, an appeal lies from the supreme Irish Courts to the House of Lords.

(n) As to the effect of these words, see *Frogmorton v. Wright*, post, 889.

(o) It appears from 1 Burr. 912, that the lessors of the defendant in error,

whose demises are material, were, Wesley Harman, eldest son and heir of Lucy Mervin, one of the testator's daughters; Eleanor Irwin, another daughter, and widow of one Irwin; and Anne Mervin, also a daughter, and widow of one Mervin, *alias* Richardson; and that all the other daughters, and all the sons, had died *s. p.*: the two nephews were also dead. Henry Mervin had aliened the property, contained in the deed of 1711, after his father's death, to Strong.

Comyns and *Sympton*, in Common Pleas, Mich. 1750, *Willes*, C. J., *Birch* and *Gundry*, Js., were of opinion, that where an estate is *particularly* disposed of in a will, the reversion of it will not pass by a general residuary devise in the same will, provided there be somewhat else that passes to satisfy the general words: *Burnet*, J., *contra*. 2dly. That if he did intend to devise it, it must pass (if at all) as an executory devise; but the contingency is too remote for that purpose (*p*). An estate *in futuro*, to vest on a contingency precedent, is the definition of an executory devise. The Courts have gone very far to support executory devises. They have been held good, if to take effect after one life or more in being:—or after two successive lives:—Or after one life in being, and twenty-one years after. A devise to the unborn son of a bachelor has been allowed, because the contingency must happen within one life: and one to the unborn son of A. B. when he arrives to the age of twenty-one has been also held good. But this case exceeds them all. This devise takes effect after payment of debts indefinitely, which may surpass the longest term hitherto allowed. The enquiry here is, not how soon the estate *may* vest, but how soon it *must* vest; what is the *longest* time that can possibly happen before it vests. The Court cannot foresee when the debts will be paid. *Bagshaw* and *Spencer* (*q*) in Chancery, M. 1748; a devise after payment of the testator's *debts indefinitely. Lord *Hardwicke* held it too remote a contingency to ground a good executory devise. Objection 1. Olivia's was only a personal power to sell; therefore the contingency must happen within a life. But this was otherwise held in *Bagshaw* and *Spencer*. Objection 2. By an Irish statute of limitations, lately made, no claim of debts is allowed, unless made within twenty years; therefore the contingency must happen within that time.—But this act does not extinguish the debts. It only bars the remedy. It may, or may not, be pleaded; and if it may not, there is a possibility of the contingency's lasting longer. But if the executory devise was void at its creation, it could not be cured by any subsequent matter, as this statute is: so held 25 April, 1733, Lord *Lanesborough* and *Morgan*, in Dom. Proc. (*r*).

Norton, for the defendant in error, argued,—1st. That the testator meant to devise the reversion, by the generality of his introductory clause, *All my worldly estate*; which is equivalent to the case of *Beechcroft* and *Beechcroft*, 2 Vern. 690, where *all my estate in the world* was held to carry a reversion. See also *Moor*, 341, *Owen*, 155. There is also no doubt but the words *lands*, *tenements*, and *hereditaments* are large enough to carry it; *Chester* and *Chester* (*s*); 2 Vern. 621 (*t*). 2dly. That

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Query, if an executory devise can be expectant on the expiration of a trust to pay debts of the testator?

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(*p*) See *Goodman v. Goodright*, *ante*, 188.

(*q*) 1 Wils. 238, 1 Ves. Sen. 142, 2 Atk. 570, 577, *Fearn's C. R.* 121. As to what estate a devise for payment of debts gives, see *Doe v. Weston*, *post*, 1215.

(*r*) The case here alluded to seems to

be that of *Lady Lanesborough v. Fox*, 3 Bro. P. C. 130 (2nd ed.), *Cases temp. Talb.* 262.

(*s*) 3 P. Wms. 56.

(*t*) *Strode v. Russel*: see also *Frogmorton v. Wright*, *post*, 891, n.; *Roe v. Bolton*, *post*, 1045.

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this will take effect as a present use to the devisees. The payment of debts is a mere charge, and the use vests subject to that charge; at least it will operate as an executory devise, the sale for payment of debts being a mere personal trust to Olivia, and, as such, must die with the person. And the testator must very well know, from the paucity of his debts, that the devise would take effect within the time limited by law.—No debts are found by the special verdict, and therefore from the comparison of this, with the Irish statute of limitations, the law will conclude there were none; and, if so, then the estate vested immediately on the testator's death.

[*203] *Per Cur.* Lord MANSFIELD, C. J.—The question in this case consists of two branches; 1. Whether this limitation *was good by way of executory devise; 2. Whether, on the fundamental merits, the testator meant to devise the reversion by these general words.

1st. We shall give no opinion on the first, because the second will make a total end of the question. However, I think the Case of *Bagshaw* and *Spencer* is not applicable to the present case.

2d. The general words are certainly sufficient to carry the reversion, if there were no particular reasons to the contrary. Indeed, had he mentioned estates *in possession*, then the reversion would not have passed; and those words may be supplied by the Court, if they believe it agreeable to the testator's intention. And his intention is very apparent from other express words in his will; the provisional clause in particular, whereby he directs, that the lands devised shall go over to Theophilus, in case the settled estate shall come to James. Every part of this clause speaks, that he had no intention of devising the reversion. Let us suppose two cases that might have happened under this settlement. If Henry's wife had died without issue male, and he had married again and had issue; then if the reversion be here devised, the son of Henry and heir at law of the testator must be disinherited of the whole. Again, if Henry and Audley both die without issue male; then, on this construction, James must forfeit the whole estate comprised in the deed of 1711, and yet the testator plainly supposes, that if the estate in settlement descended to James, it would be more advantageous than the estate devised. This construction would be therefore absurd, in case of these two events; and the construction must be uniform in case of all events. Wherefore it is demonstrable, that the testator did not intend to cover the reversion by these general words. Probably he did not know the reversion was devisable by him. Every other word throughout the whole will restrains the generality of the words to those estates, of which he was seised in fee *in possession*. 1. Locality; his expressing the place where the lands lie; place is properly applicable to lands only, not to incorporeal hereditaments, as remainders and reversions. Thus devises of lands have been held to pass only a man's *lands*; but devises of one's *estate* will convey the *whole interest*: Yet where locality is an-

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nexed to the word *estate*, it has been restrained to the lands in possession only (v). 2. When a man intends to devise a remainder or reversion, he usually expresses them by those names, and does not leave it to be collected from the general expression of *seised in fee-simple*. But these are only additional strengthening arguments; it being clear in this case, that the testator did *not* mean to devise the reversion, and therefore we shall supply the words, *in possession*, which are wanting (u). Such supplying is not without example. In *Coryton and Hilier* (w), a devise was for 99 years, omitting the words *if he should so long live*; Lord *Hardwicke*, Chancellor, thought from the nature of the settlement, that this was the intent of the testator, and that these words should be supplied to correct, qualify, and restrain that general devise. This case is much stronger; because, there the intent was collected only by implication; here it is collected from the express words of the testator.

8th of May, 1760. This judgment of reversal was affirmed in *Dom. Proc.*

FOSTER and WILMOT, Js., *accord*.; DENNISON, J. (absent at the argument through indisposition) gave no opinion (x).
Judgment reversed.

(v) See *Countess of Bridgewater v. Duke of Bolton*, 6 Mod. 106; *Berry v. Edgeworth*, 2 P. Wms. 522; *Tuffnell v. Page*, 2 Atk. 37; *Goodwyn v. Goodwyn*, 1 Ves. S. 226; *Holifast v. Marten*, 1 T. R. 411; *Fletcher v. Smiton*, 2 T. R. 656, & 659 n; *Roe dem. Child v. Wright*, 7 East, 259; *Chichester v. Osendon*, 4 Taunt. 176; *Baileys v. Gale*, 2 Ves. S. 48. See also *Doe v. Rout*, 7 Taunt. 79; *Doe v. Pigott*, Id. 553, 1 B. Mo. 274; *Harding v. Gardiner*, 1 Brod. & B. 72, 3 B. Mo. 565.

(u) See *Freeman v. Duke of Chandos*, 1 Cowp. 363; *Alkyns v. Alkyns*, 2 Cowp. 808; *Goodright v. Marq. of Downshire*, 2 Bos. & P. 660, where Lord *Alvanley* observes, that in the principal case, "the Court did not proceed upon the argument of presumption of an intention to exclude, but upon the inconsistencies and absurdities, which would arise from including the estate in question. See also *Smith v. Saunders*, *post*, 736.

(w) 2 Cox, 340; cited in 2 Burr. 923, 2 Ves. S. 195; *Fearne*, 590.

(x) This case is recognized in *Doe dem. Reade v. Reade*, 8 T. R. 118. "The common expression in the books, that an heir shall not be disinherited, except by express words, or necessary implication, is not correct; the proper terms of the rule are, that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited." *Per Willes*, C. J., in *Moore dem. Fagge v. Heaseman*, *Willes' R.* 140. And where there is no

ambiguity, a devise is as much favoured as an heir at law; *Per Holt*, C. J., in *Falkland v. Bertie*, 2 Vern. 340; *Anon.* 6 Mod. 133, ca. 180, S. P. In construing wills, every word is to have effect, if not inconsistent with the general intention, which is to control; if two parts are totally inconsistent, the latter prevails; if a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty; *Constantine v. Constantine*, 6 Ves. Jun. 100; *Blandford v. Blandford*, Roll. R. 319. "The safest course is to abide by the words: where they have once got a clear, settled, legal meaning, it is very dangerous to conjecture against that, upon no better foundation, than simply that it is improbable the testator could have meant to do one thing by one set of words, having done another thing, using other words, as to persons in the same degree of relation to him:" *Per Eldon*, C. in *Crooke v. De Vandes*, 9 Ves. J. 205. And see *Molynous v. Scott*, *post*, 376. *Croke, J.*, says, "1, No will ought to be construed *per parcellas*, but by entireties; 2, To admit of no contrariety or contradiction; 3, No negation, nor any nugatory thing ought to be in a will: and these rules being observed, as a key, they will open the doors in every will;" in *Mirrill v. Nichols*, 2 Buls. 178. As to the construction of wills, see *Bac. Abr. Wills & Test.* (F), and 1 *Roberts on Wills*, 353, (ed. 1826).

SMITH v. STOTESBURY.

S. C. 2 Burr. 924.

Promise of a bribe to a bailiff to take bail, is illegal, and will not maintain an action on *assumpsit*.

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ERROR from the Court of Stepney. The plaintiff was a sheriff's bailiff, and had arrested one Redshaw at the suit of one Stanton, on a *capias* from the Common Pleas for 250*l*. Redshaw had procured the defendant Stotesbury to be bail for him, for which he was to give him fifteen guineas; and, in order to influence Smith to accept of his bail, Stotesbury agreed to give him six guineas and a half, when Redshaw paid him the 15*l*., which he soon after did. But Stotesbury failing in his promise to Smith, he brought an action on the case in Stepney Court, setting forth this matter in his declaration, and also counted on a general *indebitatus assumpsit*. On *non assumpsit* pleaded, and *issue joined, the jury found a general verdict for the plaintiff, with 4*l*. 19*s*. damages, (the jurisdiction of that Court not extending to 5*l*.) and judgment was entered for the plaintiff. But in the King's Bench the Court were all of opinion, that this was an illegal consideration, and reversed the judgment with much indignation(y).

(y) *Bridge v. Cage*, Cro. Jac. 103; *Badou v. Salter*, W. Jon. 65; *Featherston v. Hutchinson*, Crok. Eliz. 199; 1 Roll. Abr. *Action sur Case* (T) pl. 2, 3, 4, pa. 16.

See 23 H. 6, c. 9; 2 G. 2, c. 22, s. 1; 32 G. 2, c. 28, s. 1, and *Rogers v. Reeves*, 1 T. R. 418.

TIMBRELL v. MILLS.

Court will not take notice in a collateral way of a commission of bankrupt, in order to screen a sheriff who has acted dishonestly.

ACTION against the sheriff of Gloucestershire for a false return. The case was, that Timbrell had recovered 92*l*. damages against one Hinton; and the under-sheriff, by his bailiff, on 27th September, 1757, executed a *feri facias* for the same, and, on 10th of October following, the bailiff paid the money to the under-sheriff, who kept the same for near a year; when being called upon for a return of the writ, he (in Trinity Term, 1758) returned, that the goods remained in his hands *pro defectu emptorum*; which being false in fact, this action was thereupon brought against the high-sheriff, and judgment was had by default; and in August, 1759, a writ of enquiry was executed (which assessed 92*l*. damages) without any defence on the part of the defendant. Pending this suit, viz. 27 February, 1759, a commission of bankruptcy was taken out against Hinton, the original defendant, and an act of bankruptcy proved 22 September, 1757, previous to the execution of the *feri facias*, whereupon the defendant, the high-sheriff (the under-sheriff being run away) paid the money 9th June, 1759, into the hands of the assignees. And upon these circumstances, Serjeant Nares and Mr. Norton moved, to stay all proceedings against the sheriff, as the money levied was clearly the property of the assignees, according to the doctrine laid down in *Cooper*

and *Chitty*, M. 30 G. 2(x). But the whole Court declared, that it was allowed in that Case, that if the sheriff levies the money and pays it to the plaintiff, before any commission issued and without notice of the act of bankruptcy, he will at all events be safe (a).

And in the present Case it was ruled by Lord MANSFIELD, C. J., *et tot. Cur'*, that no difference can be made between the sheriff and under-sheriff: That where an officer acts fairly, and is under real difficulties how to conduct himself, the Court will endeavour to help him as far as possible: But here the behaviour of the officer (*i. e.* the under-sheriff) is most unjustifiable, dishonest, and contrary to the duty of his office. The delays made by him at first were trivial. And even after these, when called upon, he might have put the bankruptcy in issue, by returning *nulla bona*. Instead of which he makes a notoriously false return. When an action is brought for this, then a commission is taken out; and the sheriff, to save the costs of the suit, makes a bargain with the assignees, pays them the money, and then applies to this Court to be assisted and protected. We will not interpose to protect an officer who has thus misbehaved. Let him take the consequence of his false return. Had he made a true one, or paid the money into Court, we would have protected him. We are strangers to this act of bankruptcy and the proceedings thereon, which, for aught we know, may be fraudulent; and it is now too late for us to take cognisance of it upon this action.

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Rule was discharged.

(x) *Ante*, p. 65, and see the cases there cited; and *Clarks v. Ryall*, post, 642.

(a) *S. P. Hitchin v. Campbell*, post, 829; and see *Howard v. Jewmett*, post, 400.

The KING v. The Inhabitants of WEYHILL, Hants.

S. C. Burr. Sett. Ca. 491.

MR. Norton moved to quash an order of Sessions confirming a removal of a pauper from A. to B. It stated, "that it appeared from the pauper's evidence, that about forty-eight years ago, being then about eight years old, he lived six years with one Mr. Pike, upon charity, in B., and ran of errands, &c.; but that no contract was entered into between Pike and the pauper, nor any wages ever passed between them. Whereupon the justices declare, that at this distance of time, a contract must be presumed between Pike and the parish, or the father of the pauper, and adjudge it accordingly, and that the pauper was settled in the parish of B."

Contract of hiring shall not be presumed.

Mr. Gould, in support of the order, argued, from the Case of *Crediton and Wincanton, A.D. 1749 (c)*, that a hiring shall be presumed from a general service; because there a hiring for a year was presumed from a general hiring. And he insisted, that there was no necessity for the contract to be between the par-

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v.
WEYHILL.

ties themselves, it being equally good if made by the parent for his child.

But without hearing the counsel in reply, the Court, DENNISON, FOSTER, and WILMOT, Js. (*absente* Chief Justice), agreed to quash the order, there being evidently no proof of a contract (*d*).

(*d*) It is to be observed, that it was expressly stated, that the pauper lived with Mr. P. "upon charity;" and the Court said (Burr. S. C.), "Here was no contract, but he was taken out of charity."—A contract of hiring may be inferred from the pauper having served a year as a husbandman; *R. v. Lyth*, 5 T. R. 327;—having served three years as a menial servant, though at first hired for only part of a year; *R. v. Long Wharton*, Id. 447; *R. v. Hales*, Id. 668, S. P.;—having lived two years as an ostler; *R. v. Holy Trinity in Worsham*, Cald. 141, 2 Bott, 539. But this presumption may be rebutted by facts, which shew that the relation of master and servant did not exist: as where a lad was

sent to a barber to learn shaving, &c. and lived with him above a year; *R. v. Wallon*, Carth. 400;—where a boy lived with his uncle as a relation, receiving meat, &c. but no wages; *R. v. Stokesley*, 6 T. R. 757;—where the pauper came to assist the waiter at an inn, at his request, when he was ill; *R. v. St. Matthew's, Ipswich*, 3 T. R. 449. And see *R. v. Pendleton*, 15 East, 449; *R. v. Sow*, 1 B. & A. 178; *Trinity v. St. Peter's, Dorchester*, post, 443. And if the Sessions have expressly found the fact of a hiring and service for a year, the Court of King's Bench will consider themselves bound by it, though they entertain a different opinion; *R. v. Tyrley*, 4 B. & A. 624.

ANONYMOUS.

Court inclined to discourage trifling actions.

MR. *Dunning* obtained a rule to shew cause, why, on payment of 3*s.* 9*d.* to the plaintiff, all proceedings should not stay, on an affidavit that there had been only one transaction between the plaintiff and defendant, on which there was a balance due to the plaintiff of 3*s.* 9*d.* for horse-keeping, for which this action was brought, and 10*l.* damages laid. Afterwards, Mr. *Hussey* shewed for cause, that the debt was really 19*s.*, for which the cause of action arose in Dorset, but that the defendant lived in Somerset, and therefore was not amenable to any inferior Court. Whereupon the Court recommended to stay all proceedings on payment of the 19*s.*, to which both parties consented.

JOHNSON, Assignee of a Bankrupt, v. SMITH, an Executor.

S. C. 2 Burr. 950.

The statute of limitations shall run from the actual suing out of the writ, and not from the *teste*.

[*Post*, 215.]

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ASSUMPSIT for goods sold and delivered to Smith's testator by the bankrupt. Plea, *Non assumpsit infra sex annos*, before the exhibiting of the bill. Replication, that on 28th November, 32 Geo. 2, the latitat was sued out, and the undertaking of the defendant was within six years preceding. Rejoinder, that by the custom of the King's Bench, a latitat sued out after the end of the Term is supposed to have issued within the Term preceding, and that the latitat in this cause was *not sued out till the 8th December, 32 Geo. 2, and that the undertaking was not within six years before such actual suing out. Plaintiff demurs, and defendant joins in demurrer.

JOHNSON
v.
SMITH.

Serjeant *Poole*, for the plaintiff, argued, that the statutes of limitation should take place from the teste of the latitat, and not from the actual suing out, and cited 1 Lev. 273; Cro. Car. 264; 1 Ro. Abr. 538; 1 Sid. 53; Sty. 156; Carth. 233; Sir T. Jo. 150; 1 Lutw. 333; *Jones and Burnet*, *Hoare and Gates*; Cases King's Bench, temp. Lord Hardwicke, 73, 96, 183; *Medcalf and Burroughs*, P. 14 Geo. 2. He observed also, that in fines and recoveries, the *dedimus* and other formal parts are usually sued out before the original, though that is tested first(e); and if averments be allowed against the times of their teste, all the assurances of the kingdom would be shaken.

Mr. *Yates* for the defendant argued, that the Court has frequently taken notice of the true time of suing out a writ, in opposition to the teste of it. 1 Ventr. 262; 2 Keb. 173, 198, 213; 2 Salk. 650; 2 Rol. Abr. 554, pl. 4, 5; 1 Sid. 432. So too, the statute of frauds determines that the true time of signing judgment shall be looked upon as the only material one (f). And there is a similar provision in the Stamp Acts. 2. This is a case in which it may and ought to be done. The statute of limitations is a plain, sensible, remedial act; Salk. 421; (1 Lutw. 333, *contra*, when inspected, is no very weighty authority). There are negative words in it, which expressly prohibit the present action; "within six years, and not after." No fiction or relation of law ought therefore to be admitted to elude this statute.

LORD MANSFIELD, C. J.—This point has been already argued seven times in different suits, without ever coming to judgment. It is high time it should be settled. The Court will consider of it and deliver their opinion soon.

S. C. post, p. 215.

(e) See *Swann v. Broome*, post, 526.

(f) 29 C. 2, c. 3, s. 14.

THE KING v. SPRAGGS.

S. C. 2 BARR. 930.

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THE defendant was convicted on an indictment for a conspiracy. Serjeant *Davy* moved in arrest of judgment. Mr. *Gould* objected to the regularity of this motion, the defendant not being in Court, on the authority of 2 Stra. 1227.

Serjeant *Davy* endeavoured to make a distinction between persons convicted of felony and other misdemeanors; and, if the clerk in Court would undertake for the defendant's appearance in the case of misdemeanors, he argued that it was equally beneficial to the public.

When conviction is removed by *certiorari*, no motion can be in arrest of judgment, unless the defendant be personally present.

But the constant practice being, that the defendant should be personally present, whenever he moves to arrest a judgment on a conviction removed by *certiorari*, because otherwise it may be an expence to the prosecutor afterwards to bring him up by *habeas corpus*; the Court refused to hear the motion, and directed the Serjeant now to move for a *habeas corpus*, on

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behalf of the defendant, to bring him up the second day of next Term; which was granted (g).

(g) See *R. v. Gibson*, 2 Stra. 968; *R. v. Opie*, 1 Saund. 301. So the Court will not entertain a motion for a new trial for a misdemeanor, unless all the defendants

be in Court; *R. v. Teale*, 11 East, 307; *R. v. Askew*, 3 M. & S. 9. And see *R. v. Gibson*, *ante*, 198.

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EASTER TERM,—33 GEO. II. 1760.—K. B.

FLETCHER v. HENNINGTON.

S. C. 2 Burr. 944.

Solvit ante diem
not an immate-
rial plea in debt
on bond.

ACTION of debt on bond. Defendant craves *oyer* of the condition, which was to pay money, *on or before* the 30th day of April, and then pleads, that he paid the money on the 13th of April preceding. To this the plaintiff demurs, as being frivolous, and tendering an immaterial issue.

Aspinal, for the defendant, argued it to be a good plea, on the authority of *Tryon* and *Carter*, T. 8 Geo. 2 (a). DENNISON, J.—This is a good plea. The plaintiff may make it material or immaterial, by his replication. If he traverses the plea, as it now stands, it will be immaterial; because, if the money be paid on the day, it will satisfy the bond: he should reply, that the defendant did not pay it on the 13th, nor at any time *before* the 30th, nor *on* the 30th; which would put the matter on the proper issue.

Leave given to the plaintiff to withdraw his demurrer and reply (b).

(a) 2 Stra. 994, Cunn. 71, 106; cited also 1 Burr. 302.

an authority in 2 Wms. Saund. 48 a, n. and Willea' R. 587, n. (a).

(b) *Anon.* 2 Wils. 173, *occ.* Cited as

THE KING v. BATHURST and Others.

Trustees of a
lecture to be

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preached at a
convenient hour,
may appoint
any hour they
please; and
vary their ap-
pointment.

MOTION for a *mandamus* to the churchwardens, &c. of St. Dunstan in the West, to admit William Romaine to Dr. White's lectureship in that parish. Dr. White, in 1622, *by will, devised an annuity, for the support of a lecturer in St. Dunstan's, to prevent the increase of the doctrine of the Church of Rome, or other straggling opinions; who should "preach every Sunday and Thursday, from the beginning of Michaelmas, to the end of Trinity Term, at a convenient hour in the afternoon (to be appointed by the churchwardens and officers of the parish) for the benefit of children and servants." About ten years ago Romaine was elected lecturer, and preached for many years, at the usual hour of three, till Michaelmas Term, 1759, when he was prevented by the vicar and churchwardens,

the vicar preaching instead of him; which was the foundation of this motion.

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Morton shewed for cause, that *Romaine* was become a very popular methodist preacher, which so crowded the church, that the parishioners could not repair to their seats. Whereupon the churchwardens, at the request of the parish, in Michaelmas, 1759, appointed the Sunday's lecture to be preached at seven in the evening and the vicar himself undertook to preach at three. That this was in the breast of the churchwardens, and better for the parish, who have now three sermons instead of two. That the churchwardens have varied the hour at three several times, and once on the opinion and authority of Serjeant *Pemberton*.

Norton, Serjeant *Davy*, and *Knowler*, argued in support of the rule, that the only offence charged on *Romaine* was, being too good a preacher, and crowding the church; to cure which evil, the vicar was desired to preach himself. That the word *afternoon*, *ex vi termini*, excludes every hour in the morning, evening, and night. Otherwise, it might be appointed for midnight. That the sermon ought to be preached immediately after divine service; being originally substituted in lieu of catechetical lectures, which were appropriated to the afternoon; but as the puritan doctrine prevailed, and sermons became fashionable, the sermon got the better of the catechism. That the hour of three is more convenient, especially for children, than seven at night in the winter.

* *Per Cur.*—*Romaine* has applied to the Court under false colours. He has suppressed a material fact, that of changing the hour from three to seven, only stating the refusal at three, and not the new appointment at seven. Had this been disclosed, the Court would never have granted a rule to shew cause. [*212]

We chuse to avoid the question, Whether Dr. White has a power to erect a lecture, so as to bind the minister of the parish. But supposing him to have that power, he has directed his lecture to be preached at a convenient hour. His trustees stand in his place; they have determined, in conjunction with the rest of the parish, what is the proper hour; and shall the lecturer dispute it with them?

Rule discharged *per tot. Cur.* with costs (c).

(c) See *R. v. Barker*, post, 352, n. (e).

THE KING v. VANDEVÄLD.

S. C. 2 Burr. 991.

SAMUEL Vandeväld, Esq., lord of the manor of Aldenham in Hertfordshire, was charged to the poor's rate, for the manor itself (exclusive of the demesne lands, &c.) consisting, as was stated specially, of quit-rents, fines for renewal of copyholds, and other casual fruits and profits, the whole amounting com-

Quit-rents and casual profits of a manor, not liable to the poor's rate.

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v.
VANDEVALD.

munibus annis to 130*l.* per annum; the said Samuel Vandevald occupying nothing else in the parish. On appeal to the Sessions, the Justices confirmed the rate, setting out this special case. The order being removed by *certiorari*, it was objected, that the lord was not an inhabitant, nor were the rents and profits of the manor rateable under stat. 43 Eliz. c. 2, being neither lands, houses, tithes, nor any of the things recounted in that statute.

Mr. Gould, and Mr. Knowler, in support of the rate and order, argued, that these words were only put as examples;—that the statute has not determined what species of property is or is not taxable, but that has been fixed by the resolutions of the Courts;—that personal estate is taxable, though not mentioned in the statute (*d*);—that the lord is an inhabitant according *to Sir Edward Coke's derivation, *ab habendo*; 5 Rep. 67; 2 Inst. 702 (*e*);—or if not an inhabitant, yet the statute mentions; “inhabitants, parsons, vicars, and others;”—that tradesmen are rateable for their stock in trade; Ld. Raym. 1280 (*f*);—that a toll of a market is taxable, 3 Keb. 540 (*g*);—that ground-rents are taxable, Comb. 62, and also quit-rents, Carth. 14; Comb. 264. (Mansfield, C. J., observed, that these authorities were only scraps and strange stuff: *quod Gould concessit*)—that though manors never have been taxed, it is no argument that they never shall: It is high time they should be. The clergy once claimed the like exemption by custom; but when it came to be debated, their plea of custom was overruled.

Mr. Norton and Mr. Fielde, on the other side observed, that the argument drawn from custom was not contrary to the express words of the statute, as in the case of the clergy, but that it shewed the uniform interpretation of the statute, in excusing manors: That quit-rents issue out of lands, which have already been fully rated in the hands of the occupier, and therefore are not liable to be rated again;—that casual profits are of the same nature; they are part of the profits of the land, which has already been fully rated;—that it is impossible to be law, that ground-rents are rateable; they are of the nature of all other reserved rents on leases for years;—that tolls (if rateable) are only so, because not rated in any other shape;—that few mines are ever rated, though expressly named in the statute, because their profits are casual; and you can't assess by an average in a monthly assessment, since the present owner may be no gainer by his mines (or other casual profits) though his predecessor and successor may gain a great deal (*h*).

(*d*) See *R. v. Canterbury*, post, 667, where the cases on this point are referred to.

(*e*) 2 Rolle's Abr. 289, (H); *Hollege's* Ca., 2 Roll. R. 238; *Att. Gen. v. Parker*, 3 Atk. 577; *R. v. Jones*, 8 East, 451; *R. v. Nicholson*, 12 East, 330; *R. v. Tunstead*, 3 T. R. 523.

(*f*) *R. v. Hill*, 2 Cowp. 613; *R. v.*

Mast, 6 T. R. 154; *R. v. Ambleside*, 16 East, 380; and *R. v. Canterbury*, post, 667.

(*g*) But the lessee of market tolls in gross, not incident to the soil, is not rateable to the poor in respect of his occupancy thereof; *R. v. Bell*, 5 M. & S. 221.

(*h*) See *Lead Comp. v. Richardson*, post, 389.

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Besides, if a manor extends into two parishes, how shall the lord be rated, and where? Where shall it be collected, or what remedy will there be for non-payment? How will you distrain, or commit for want of distress, when the lord lives out of the county?—This doctrine, now set up, will in consequence extend to ground-rents; and if to those, then to all other rents whatsoever, which is a matter of the utmost importance.

By MANSFIELD, C. J.—As this is a general question, we will think of it; but, for myself, I have not the least doubt.

* Afterwards, in the same Term, the Chief Justice delivered the opinion of the Court, that there was no colour for rating the manor in question; that it would introduce a long train of absurdities, which had been stated at the bar; that there was therefore no occasion to go over the matter again; but that the rate must be quashed (s).

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(s) "The case of quit-rents goes on the objection of double rating the same property in the hands of the landlord as well

as the tenant:" *Per Lord Kenyon*, in *R. v. Alderbury*, 1 East, 534; and see *Loundes v. Horne*, post, 1252.

CHISTCHURCH v. BETHNAL GREEN.

S. C. Burr. Sett. Ca. 494.

MOTION to quash an order of Sessions, which stated, that "E. S., 24th August, 1757, was hired for a year by a person in the parish of N., and staid in that service till 7th August following; and then was seised with fits; upon which she was sent to the hospital by her master's desire; and she looked upon her contract as discharged; all her wages being paid, and another servant hired in her stead," and upon this the Sessions adjudged her settled with her master at N. Norton objected to this, as not being a complete serviece.

Absence through sickness at the end of a year, no obstruction to the servant's settlement.

Aston and *Stow* shewed cause; and insisted, that when a servant is under the visitation of God, he shall be taken as all the while in the service of his master; *King* and *Islip*, Str. 423; and that absence for a reasonable cause will not defeat a settlement; *Ibid.* and *King* and *Sandwich*, Str. 1232.

Norton, *Morton*, and *Lane*, supported the objection, by observing, that the absence in the *King* and *Islip* was in the middle of the year, and therefore was purged by the master's receiving his servant again; but here the absence was at the end of the year, which cannot be purged at all; *Seaford* and *Castlechurch*, Str. 1022. And if any absensee be permitted at the end of the year, where shall we stop?

MANSFIELD, C. J.—This case is one of the many instances of the bad policy of our poor-law. Here has been a question litigated before two justices, then the Sessions, and lastly this Court; which, before a plain man of sense, would have made no question at all. A service without fraud or collusion, in the same manner as servants *bond fide* would otherwise have

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served their masters, if no poor-laws existed, is a good service to gain a settlement. If the act of God prevents a servant from performing his contract, this is incident to humanity, and is necessarily a case exempted. The master is not at liberty to turn his servant out of doors, to subtract wages, to deny food or necessaries, on account of sickness. Nor can I frame a distinction between the visitation of God, happening at the beginning, in the middle, or at the end of the year.

DENNISON, J.—This is the weakest case to avoid a settlement I ever met with. Where absence is occasioned by the act of God, it is not the return back to the service that gains the settlement: supposing the pauper had been bed-ridden in her master's house, this would certainly gain a settlement. Here the master for his own convenience desires her to remove. She must still be considered as his servant.

FOSTER, J.—The relation between master and servant remained to the end of the year.

WILMOT, J.—The distinction is, that if a servant is absent *without a reasonable cause* or consent of the master, in the middle of the year, the offence may be purged by the master's taking him again, which cannot be done upon such absence, at the end of the year. But if he be absent *for a reasonable cause*, in the middle or at the end of a year, it is still a settlement.

Rule for quashing the order of Sessions was discharged, *per tot. Cur.' (k)*.

(k) *R. v. Madington*, Burr. S. C. 675; *R. v. Sharrington*, Cald. 471, 2 Bott, 525; *R. v. Sutton*, 5 T. R. 657, *acc.* But the service must have commenced; *R. v. Winterset*, Cald. 298. See also Lewin's Law of Settlement, 174 (ed. 1827).

JOHNSON v. SMITH. (*Vide p. 207.*)

LORD MANSFIELD, C. J., delivered the judgment of the Court.—This demurrer of the plaintiff can only be supported on two grounds. 1st. For that the matter of the rejoinder is not *relevant: or 2ndly, If relevant, that proof cannot be admitted of it.

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Latitat is the true commencement of actions brought by bill of Middlesex, within the meaning of the statute of limitations.

1st. The first depends on the statute 21 Jac. 1, c. 16. By the former statutes of limitation, the time was to run from the teste of the writ; but this being found uncertain, the Legislature, in the present act, avoided mentioning any set form; and left it in the discretion of the Courts, to determine what is the commencement of the suit; the prohibition being couched in these words—"Such actions shall be commenced and sued, "within, &c. and not after." The moment that the six years (in the present case) are past, the prohibition immediately attaches. The words of the statute in sect. 3, (the prohibitory clause) are general; the exceptions in sect. 4, are equally general; the words "plaint, writ, or bill," being inserted with a reference to the preceding clause; therefore no argument can be drawn, as if the law meant to leave open the door to suits

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by bill, and to shut it only against those by original. Whatever is the commencement of the suit is the subject of this prohibition; if therefore taking out the writ be the act of commencing the suit, the Legislature has prohibited that, after a delay of six years. And that this is the act of commencement, may be shewn from a clause in the statute itself, sect 5, which is decisive. Tender of amends in trespass may be made *before action brought*. Now, can it be supposed, that, after amends tendered, a latitat may be sued out, and by an implied relation back to an antedated bill of Middlesex, the express words of the statute should be virtually repealed, by implication. It has also been settled, first, in Styl. 156, then, in 1 Sid. 53, long after the statute of Jac. 1, that a latitat should be looked on as a commencement of the suit, so as to avoid the statute of limitations. And the same was lately held in *Whitaker and Henderson*, 21 Geo. 2 (l). If then latitats are allowed by the equity of the statute to be a commencement, in order to save the time of limitation; by equal equity, a defendant may be allowed to aver, that this equitable commencement came too late. In this cause, the whole dispute is between strangers to the transaction, suing and defending *in auter droit*. This shews *the necessity of a statute of limitations, and is an argument, that it ought to be construed liberally. Therefore we are all of opinion, that the matter of the rejoinder is sufficiently relevant; and that, if it appears that the latitat was sued out after six years from the undertaking, it is within the statute of limitations.

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2nd. The second point turns upon this question: Whether the real time of suing out a writ can be averred, against the date of the teste? The Court will not endure, that a mere form and fiction of law should prejudice the true justice of the case (m). Above one hundred and fifty years ago, the Court began to distinguish the real time from the fictitious, when material to the justice of the cause. 17 Jac. 1, *Pigott and Rogers*, Cro. Jac. 561. So *Harrison's Case*, cited 3 Keb. 213. And in *Bilton and Jonson*, 19 Car. 2, Raym. 161, 2 Keb. 198; where it is said, that a relation shall not work a wrong. Same distinction taken in *Hawway and Merry*, 1 Vent. 28, 21 Car. 2,

The true time of suing out a latitat may be averred, against the teste of the writ.

(l) In addition to the cases cited in the text here and *ante*, p. 208, see *Hollister v. Coulson*, 1 Stra. 550; *Crookatt v. Jones*, 2 Stra. 736, 2 Lord Raym. 1441; *Hardyman v. Whitaker*, 2 East, 573, n. (a); *Morris v. Harwood*, post, 312, 320. So a *capias quare clausum fregit*, in C. P.; *Leader v. Moson*, post, 925; *Brown v. Babington*, 2 Lord Raym. 880; *Karver v. James*, Willes, 255, Bull. N. P. 150, 7 Mod. 348: in which case it is said, that where continued process is replied to bar the statute of limitations, it must be alleged, that the first writ was returned. *S. P. Harris q. t. v. Woolford*, 6 T. R. 617; *Stamway q. t. v. Perry*, 2 Bos. & P. 157; *Harrington v. Taylor*,

15 East, 378: see also *Markland v. Leadbeater*, post, 1131. The suing out a latitat or a *quare cl. fr.* may sometimes be considered as the commencement of the suit; and sometimes only as process to bring the defendant into Court: as to which see *Wood v. Newton*, 1 Wils. 147; *Foster v. Bonner*, 2 Cowp. 454; *Ward v. Honeywood*, 1 Doug. 61; *Swancot v. Westgarth*, 4 East, 75; *Page v. Bauer*, 4 B. & A. 350, per Bayley, J.; *Gregory v. Hurrell*, 3 Brod. & B. 212; 8 J. B. Moore, 189; and 2 Wms. Saund. 1, n. (1); and as to pleading the statute of limitations, and replying thereto, *Id.* 62 c, n. (6).

(m) S. P. 1 Cowp. 177.

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- and *Chancy and Rutter*, 3 Keb. 218, 25 Car. 2. In *Watts and Baker*, 8 Car. 1, Cro. Car. 264, in the case of a tender under this very statute, it was held to be too late, because after an arrest on a latitat; which implies, that a tender merely after the teste would not be too late, and shews the teste not to be conclusive in case of the statute of limitations. In *Walburgh and Saltonstall*, 32 Car. 2, Sir T. Jones, 149, the truth of the fact is set up against the teste of a writ; and a distinction made between *veritas legis* and *veritas facti*; S. C. 1 Ventr. 362, *Pemberton*, C. J., said, plaintiff may declare that a writ was sued out 21st January, bearing teste 28th November (n). Again—Many penal statutes give powers of bringing actions within a limited time. And notwithstanding the doubt in 4 Mod. 129, a latitat is now held to be a sufficient commencement of the action. But, if the latitude of construction now *contended for be allowed, penal statutes would be rendered more penal by suing out writs two, three, or four months after the time limited by Parliament. Thus the stat. 23 Hen. 6, gives a penalty to a burgess elected, but not duly returned to Parliament, so as he sues within three months, and afterwards to be recovered by other persons. Suppose many writs, sued out in the long vacation, all tested the last day of Trinity Term; how shall we know who has the priority, if the true time cannot be averred? The same reasoning may be applied to the game-law. By statute 5 W. & M. c. 21, s. 4, to prevent frauds on the revenue, the officer is required to enter the *very day* that any writ or process is signed. If that *very day* cannot be shewn, the statute is absurd. I have looked into all the cases urged on the other side, and find nothing material or conclusive. The arguments urged are drawn from rules and maxims similar in sound, but not in meaning. I allow the maxim in Plowd. 491, that records shall not be averred to be antedated, &c. so as to discredit the officer; but there is no discredit to the officer, no imputation of irregularity in averring that, by custom, latitats sued out in vacation are tested in the preceding Term. If the averment was intended to invalidate the latitat, it would not then be admitted. The case of *Lee and Johnson*, Lutw. 326 (*potius Aldworth and Hutchinson*, Lutw. 330), was never argued, and the reporter passes a strong censure upon it. “And so it appears (if a party be estopped to allege the true time of suing out a writ), that in judgment of law a covenant may be broke, “where *reverd* and *in facto* it was not broke. *Quod nota.*” It was said in the argument, that, in *Hoar and Gates*, Lord *Hardwicke* was against allowing the averment. This, if true, would be sufficient to shake any opinion of mine. But Lord *Hardwicke* has assured me, that he inclined to the opinion of *Page* and *Lee* against *Probyn*; who alone was against the averment. Lord *Hardwicke* had not formed any settled opinion.
- [*218] * On the whole, we are all of opinion, that the true time of suing
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(n) S. P. Hart v. Weston, post, 683.—See post, 925.

out a writ may be averred against the teste; and therefore judgment must be for the defendant(o).

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(o) See *Morris v. Harwood*, post, 320; issuing of a bill of Middlesex on a day in more fully reported in 3 Burr. 1241. The vacation; *Harrington v. Taylor*, 15 East, 378. Court will take notice in pleading of the

MOSES v. MACPHERLAN.

S. C., 2 Burr. 1005.

MOSES had four notes of one Chapman Jacob, dated 11th July, 1757, value 30s. each. Macpherlan, 7th November, 1758, prevailed upon Moses to indorse these notes to him, upon an express written agreement to indemnify Moses against all consequences of such indorsement, and that no suit should be brought against Moses the indorser, but only against Jacob the drawer. Notwithstanding which, Macpherlan brought four actions in the Court of Conscience upon these very notes against Moses; and, upon trial of the first, the commissioners refused to go into any evidence of this agreement; whereupon the plaintiff recovered, and the defendant paid in the whole 6*l*. And now Moses, the defendant below, brought *indebitatus assumpsit* against Macpherlan, the plaintiff below, for money had and received to his use, and obtained a verdict for 6*l*., subject to the opinion of this Court.

If one recovers money *malâ fide* by suit in an inferior Court, *indebitatus assumpsit* will lie in B. R. to make him refund it back.

Morton (for defendant Macpherlan) argued, that *indebitatus assumpsit* would not lie upon a judgment recovered in an inferior court of a final jurisdiction; and cited Cro. Jac. 218; and 1 Bulstr. 152: The remedy in this case being a special action on the case for breach of the agreement.

Norton, *contra*, that this action would well lie, the remedy by action on *assumpsit* being of the most liberal and beneficial kind.

On the argument, *Mansfield*, C. J., doubted if the action would lie, after a judgment in the Court of Conscience; but wished to extend this remedial action as far as might be: To which *Dennison*, J., agreed, and inclined strongly that the action would lie. *Foster*, J., was afraid of the consequences of overhauling the judgment of a court of a competent *jurisdiction. *Wilmot*, J., was clear that the action would not lie; because this action always arises from a contract of re-payment, implied by law; and it would be absurd, if the law were to raise an implication in one Court, contrary to its own express judgment in another Court. He compared this action to the title *de solutione indebiti*, Inst. 3, 28, s. 6; and *de condictione indebiti* in Cod. and Dig. (p) in which there was always an exception *causâ judicati*; and this reason given for it, *Ne actiones resuscitentur*. But afterwards,

Lord MANSFIELD, C. J., delivered the opinion of the Court — It has been objected to this action: 1st, That debt will not

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(p) L. IV, tit. 5. "Pecunia per errorem, non ex causâ judicati, solutæ esse repetitionem conditionis non ambigitur."

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lie upon this ground of complaint; therefore *indebitatus assumpsit* will not lie. But there is no foundation for this argument. It is held, indeed, in *Slade's Case*, 4 Rep. 93, that where debt will lie, *assumpsit* will also lie; but the negative doctrine, *e converso*, is not any where held; it is rather a general rule, that where debt will not lie, *indebitatus assumpsit* will (q). 2dly, That in this case no implied contract can arise, whereupon to ground an *assumpsit*. But surely, if a man is *bond fide* obliged to refund whatever money he has unlawfully received, an implied debt is thereby raised, *quasi ex contractu*. 3dly, That where money is recovered in a Court having a competent jurisdiction, it cannot be overhauled in another Court, but by writ of error or false judgment. But the verdict given in this cause is consistent with the determination of the Court of Conscience. The commissioners determined merely upon the indorsement, and refused to go into the collateral matter of the agreement; in which they did right; else, upon such a matter as a note of 30s., they might go into a large and extensive account; and might settle the balance of a series of mercantile transactions, much superior to their conusance(r). And yet, though the judgment was right, the iniquity of keeping the money so adjudged to be paid may appear in another Court. Suppose an insurer is condemned to pay money on the

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* death of a person who afterwards appears to be alive; would not a new action lie for him, against the person who recovered upon the former judgment?(s) The admission that an action will lie upon the express agreement, is conclusive upon this case. For the great benefit of this action (upon an implied contract) is, that the plaintiff need not set out the particular circumstances, on which, *ex æquo et bono*, he demands a satisfaction; but may declare generally for money had and received to his use, and may give the special matter in evidence. And it is equally beneficial to defendant, who may give in evidence any equitable matter, in order to discharge himself. Therefore, if it stood merely upon principles, there is no reason why the plaintiff should be confined to his action on the special agreement, and be debarred his remedy on the *assumpsit* implied by law. But the point has been expressly determined in *Dutch and Warren*, M. 7 Geo. 1, Common Pleas(t): wherein it was held, that it was at the election of the party, either to affirm an express contract, by bringing an action on the special agreement, or to disaffirm it, and rest on an implied one, by bringing *indebitatus assumpsit*. In this case, the plaintiff had paid to the defendant 262l. 10s. for five shares in Copper Mines, to be transferred on the 22d of February, which defen-

(q) See 1 Com. Dig. *Assumpsit* (C), pa. 194.

(r) But see *Fomin v. Orvell*, 1 M. & S. 393.

(s) See *Tomkins v. Bernet*, 1 Salk. 22, Skin. 412, S. C. where it is said: "one bound in a policy of assurance, believing the ship to be lost, when it was not, paid

his money; and it was held he might bring an *assumpsit* for the money." See *Ld. Mansfield's* observations on that case, 2 Doug. 697 a; *Holmes v. Hall*, 6 Mod. 161; *Martin v. Sitwell*, 1 Show. 157. This opinion is adopted in *Park's Ins.* 598 (ed. 1817).

(t) 1 Stra. 406.

dant failed to do. Plaintiff brought *indebitatus assumpsit*, for money had and received to his use: And the jury, who in these actions can go into all the equity of the transaction, gave him 175*l.* only, which he recovered; being the value which the shares had fallen to on the said 22d of February. Therefore we are all of opinion, that the defendant ought in justice to refund this money thus *malá fide* recovered; and though an action on the agreement would also have indemnified him for his costs in the Court below, yet he may waive this advantage and pursue the present remedy.

The *Postea* must be delivered to the Plaintiff(v).

(v) See the observations of *Eyre, C. J.*, in *Philips v. Hunter*, in Error, 2 H. Bla. 402. There a partner resident abroad, knowing that a trader in England had stopped payment, attached, in the name of himself and his partners resident here, a debt due to such trader, and obtained payment of it under the judgment of a foreign Court; it was held by six judges (*Eyre, C. J., dissent.*) that the assignees of the trader might recover the money in an action for money had and received against the partners: affirming the judgment of K. B. The Chief Justice said, (p. 414), "The case of *Moses v. Macpherlan*, is, I believe, the only decided case, that countenances such an action, but I cannot subscribe to the authority of that case."—"In the argument of that case, it is supposed to be the same thing, as to the force and validity of the judgment, whether the action had been brought upon the agreement, or to refund the money. But it appears to me to be a very different thing. Most certainly the case of *Dutch v. Warren*, does not prove the proposition. The ground of that case was the disaffirmance of the contract, upon which the consideration money had been paid."—"In the case of *Moses v. Macpherlan*, I think the agreement was a good defence in the Court of Conscience; but if it were otherwise, the recovery there was a breach of the agreement, upon which an action lay; and this was in my judgment the only remedy."—"I believe that judgment did not satisfy Westminster

Hall at the time; I never could subscribe to it; it seemed to me to unsettle foundations." So in *Johnson v. Johnson*, 3 Bos. & P. 169. *Ld. Alvanley, C. J.* observed that in the case of *Moses v. Macpherlan*, (as reported in Burr.) some principles are laid down, which are certainly too large, and which he would not rely on: such as that, wherever one man has money which another ought to have, an action for money had and received may be maintained; or that wherever a man has an equitable claim, he has also a legal action. See the observations also in *Brisbane v. Dacres*, 5 Taunt. 159, 160. And in a case, where *Moses v. Macpherlan* was referred to, it was held, that where money has been paid under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. *Ld. Kenyon, C. J.*—"After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person;" *Marriott v. Hampton*, 7 T. R. 269. And see *Cobden v. Kendrick*, 4 T. R. 432, n. (a). As to the action for money had and received, see *Vin. Abr. Actions of Assumpsit* (N 2.) & *Supp.*; *Bac. Ab. Assumpsit* (A) p. 262; *Com. Dig. Assumpsit* (A); and *Mr. Nolan's note*, 1 *Str.* 406. See also *Thurston v. Mills*, 16 East, 254; *Farmer v. Arundel*, post, 824; *Jaques v. Golightly*, post, 1073; *Barbone v. Brent*, 1 *Vern.* 176.

THE KING v. GREENWOOD.

GREENWOOD was an attorney of this Court, and, about two years ago, was struck off the roll for malpractice; and was now upon humble petition and motion re-admitted; the Court declaring, that the striking off the roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the Court sees cause (u).

(u) The like was done by the Court, T. 37 G. 3, K. B.; *Tidd's Pr.* 82 (ed. 1821). But he cannot take any advantage of his privilege in any action then de-

pending; *Ex parte Cole*, 1 *Doug.* 114, n; *Moody's Ca. Barnes*, 42. See also *Hill's Ca. post*, 991.

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Attorney struck off the roll may be re-admitted.

SELWIN v. SELWIN.

S. C. 2 Burr. 1131.

A will, made pending a common recovery, shall convey the lands recovered; *post*, 251.

Essoin day was June 3.

THIS was a case stated out of Chancery, for the opinion of the Court of King's Bench.

By deed, *A. D.* 1750, John Selwin was made tenant for life, remainder to his son John Selwin in tail. In 1751, 20th April, the father and son joined in a bargain and sale to one Wakelin and his heirs, to make him a tenant to the *præcipe*; in order for a common recovery, the uses of which were declared to be, for Selwin the father for life, remainder to the son in fee-simple. Trinity Term, *A. D.* 1751, began June 7th. On the 8th of June, John the son made a will, whereby he disposed of all his real estate (*w*). In this same Term, a writ of entry was sued out, returnable *Quinden. Trin. vis.* 17th June, and the recovery was completed the same Term; and soon afterwards John Selwin the testator died.

The question was, Whether the lands in question passed by this will, made *after* the bargain and sale, *after* the beginning of the Term, but *before* the return of the writ of entry?

Mr. *Sewel*, for the plaintiff argued, that they did not. Nothing passed to Wakelin by the bargain and sale, but a freehold descendible, so long as John the son had heirs of his body: *Seymour's Case*, 10 Co. Rep. 95 b; said in *Machil and Clark*, Salk. 619, to be a base fee, but that is a mistake. *The bargain and sale left nothing in testator. All made over to Wakelin, else he could not be tenant to the *præcipe*. The uses of the recovery then declared were future, not present uses. The testator therefore had nothing to dispose of, when he made his will, nor till the recovery was completed. Had he died before recovery suffered, he could have disposed of nothing. In *Shelley's Case* (*x*), the ground was, that the judgment was actually given the very morning of the day that the recoveree died. Pigott Recov. 153; land passeth not till the recovery completed; 2 Lev. 28, *Hudson and Benson*, S. P. I consider this recovery as a judgment on the day it really happened, and not as having relation to the first day of the Term. This never held, where it appears upon the face of the record, to be the contrary, or where it would work a wrong or injury to a third person. This would be setting up an averment against fact and the record.

(*N. B.*—In the exemplification of the present recovery, according to a practice introduced by *Willes*, C. J., about twenty years since, the date of the return of the writ of entry, which formerly used to be noted in the margin by way of memorandum, is now inserted in the body of the record.)

(*w*) He devised all his freehold and other estates, whereof he, or any person in trust for him, were seised or possessed, either in reversion, remainder, or expectancy, and all his estate, right, title, and

interest therein, to his father in fee. He died the day after the return of the writ of seisin; 2 Burr. 1132.

(*x*) 1 Rep. 93 b.

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Pigott, 58; writ of entry returnable before the date of the release, which made the tenant to the *præcipe*; therefore no tenant, and so the recovery ill. 3 Salk. 212.—(Foster, J., declared he had all the reporters in his study, but did not know 3 Salkeld: so not cited.) *Barton and Lever*, Cro. Eliz. 388; *Isley's Case*, 1 Leon. 187; 1 Sid. 452; 1 Vent. 58; Latch. 92; *Wynn and Wynn*, B. R. Mich. 16 Geo. 2 (y); wife was vouchee in a common recovery: she and her husband appeared by attorney before commissioners, but she died before the day of appearance in Court. Notwithstanding this, the judgment was regularly entered; but error being assigned because of her death, the judgment was reversed. *As to the doctrine of relation, both of the recovery to the bargain and sale, and of the judgment to the first day of the Term; see *Hind's Case*, 4 Rep. 70 b. The bare intent of the party to acquire a new estate does not give it him. Suppose it had been a covenant to suffer a recovery, and then the covenantor makes a will, after the covenant, but before the recovery actually had, and dies; nothing passes by this will, notwithstanding the intent of the party; Cro. Jac. 643; 3 Rep. 25, *Butler and Baker*; doctrine of relations laid down at large. But, secondly, if the testator had a devisable interest, still the recovery is a revocation of the will *pro tanto*. For the *cestuy que use* of the recovery, the testator, retakes his land by a new conveyance. Many cases, which shew recoveries to be revocations of wills made before the date of the *præcipe*; and the reason will be the same, if the will be made before the return of it. *Dister and Dister*, 3 Lev. 108; *Hudson and Benson*, 2 Lev. 28; *Marwood and Turner*, 3 P Wms.. 163 (x); 1 Roll. Abridgm. 614, pl. 2; Ib. 615, (Q) pl. 1; Ibid. 614, (O) pl. 3: This last case applies also to the doctrine of relation.

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York, Solicitor-General, for the defendant, considered — 1. What estate passed by the bargain and sale to the tenant to the *præcipe*. 2. Whether tenant in tail had an estate devisable, and whether he actually devised it. 3. What was the operation of the recovery on this estate.—First, as to the estate of the tenant to the *præcipe*, *Seymour's Case* (a), and *Bredon's Case*, 1 Rep. 76, shew, that a base determinable fee passed to the bargainee. Before the statute of uses, there was no other method of making tenants to the *præcipe*, but by fine or feoffment. *The use of the recovery resulted, to be executed in equity, if none was declared. Since the statute, new modes of conveyance have been introduced. The estate passed to the bargainee as a base fee. So argued by Holt, C. J. in *Machil and Clark*, Farresley (b). He has a resulting springing use, which is the same as a trust, for the particular purpose of suffering the recovery: Lord *Altham v. Earl of Anglesey*, Pigott, 201; Gilb. Rep. 16; *Long and Buckeridge*, T. 4 G. 1, 1 Stra.

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(y) 1 Wils. 35, 42; Willes, 563; 7 741; *Darley v. Langworthy*, Amb. 653, Mod. 492; Barnes, 17; 5 Cruil. Dig. 347, 3 Wils. 6, 3 Bro. Parl. Ca. 359 (2nd ed.) S. C. (a) 10 Rep. 95 b, 1 Bul. 162.

(z) S. P. *Parsons v. Freeman*, 3 Atk. (b) Or 7 Mod. 18; S. C. Holt's R. 615.

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106. After the recovery had, the use results to the tenant in tail, if no other special use be declared.—2ndly, The testator had a future executory use, at the time of making his will. Not a present use, for the statute cannot draw the estate to the use till the possibility (*i. e.* the completion of the recovery) hath actually happened. And this future executory use is a devisable interest. He said he should trace the doctrine of possibilities by analogy to the doctrine of contingencies. It was anciently held, till *Manning's Case* (c), that an executory devise on a term of years was bad. But [in] 1 P. Wms. 572, held to be an interest devisable—*Marks and Marks*, 1 Str. 134. Cases in Law and Equity, 342; *Gurnel and Wood* (d), C. B. 14 Geo. 2; devise to A., and if he dies before twenty-one, then to B. and his heirs. B. dies, and then the contingency happens by the death of A. before twenty-one. Determined, that this is an interest descendible to B.'s heir. I agree, that the possibility in the present case is not an interest assignable by conveyance; but it is devisable by will; Fitzgibb. 236, Lord Trevor's argument. It differs from a right of entry or of action. This is not a mere possibility, but coupled with an interest, Vau. 270—273. Uses after fees determinable are interests devisable. In Duke of Norfolk's Case, Lord Nottingham thought [*226] *so; Pollexf. 88: It is an use *in esse*, though not executed; and therefore devisable by will. The statute of wills intended to restore the same devising power, as existed at common law before the statute of uses. A contingent use is devisable, though not grantable, because wills enure in a different way from deeds. Deeds must pass a present estate, or vested interest. But in wills, a contingent use existing in the testator may wait a future event. Sir F. Bacon, in his reading on the statute of uses, (Works, vol. 2, p. 80, 81, last edition), makes a distinction between naked rights and contingent uses. "As to the transfer—"ring uses, there is no action at law, &c." His reasoning is analogous to that of Lord Macclesfield in *Marks and Marks*. If the tenant in tail had died before the execution of the recovery, this contingent use must undoubtedly have failed; but as the contingency actually happened, the contingent use depending thereon must be served. And, if this interest be devisable, it is clearly devised by the words, "*All my real estate;*" for real estate is *genus generalissimum*, and has been allowed to comprehend even fee-farm rents (e).—3rd. As to the operation of the recovery when passed, it enures to substantiate the devise, and not to revoke it. I allow, that the severity of legal scholastic niceties has introduced revocations, where they were never meant by the parties; and that, as those cases are now established, they are not to be shaken. But the present case differs from them all. The estate of the testator was altered antecedent to the will, because,—1st, The recovery relates to the deed of bargain and sale.—2ndly, It relates to the first day

(c) 8 Rep. 94 b.

(d) S. C. 8 Vin. Abr. 112, pl. 38, and cited 3 T. R. 94.

(e) Countess of Bridgewater v. Duke of Bolton, 6 Mod. 106: see ante, 204, n. (v).

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of the Term.—3rdly, If it does not bear either of these relations, but must be considered as subsequent to the will, yet, as the use *is instantly served on the tenant in tail himself, who did not die till after its completion, it only marks the time when an use, which before was executory, becomes actually executed.

1st, The recovery relates to the deed of bargain and sale; so that the whole makes only one conveyance. Cases cited:—

Lord Bath and Montague (f), *Holl's* argument: *Ferrars* and *Curson*, Cro. Jac. 643 (g); 1 Mod. 108; *Sir W. Pelham's Case*,

1 Rep. 14 b, which is the first case, which clearly considered recoveries in the light of common assurances. 2dly, The recovery

has relation to the first day of the Term. The Court cannot, ought not, to consider any thing but the record. The whole

Term is but one day in law. Objection. The return of the *præcipe* is on the third return of Trinity Term, and judgment

cannot be intended to be before the day of appearance. But parties if they please may appear *gratis*, before the return.

Therefore, the only question is, if there are continuances on the roll, of which, and which only, the Court is bound to take

notice. *Standford* and *Cooper*, Hetl.; Hutt.; Cro. Car. 102. The case excepted in the statute of frauds proves the general

rule. There is a distinction between the continuance of process, and the continuance of the plea or suit. If the parties

appear before the return of the writ, the plea may then go on without notice taken on the roll; but process must always be

continued on the roll, from one return to another. *Rainbow* and *Worrall*, 2 Lutw. 1177; 1 Leon. 291. Entry of the

return on the record is a mere marginal memorandum, and has no business in the body of the roll. 1 Lev. 130; 1 Sid. 213.

Wynn and *Wynn* differs from this case in four points: but principally, because, as the party appeared by attorney, it was

there necessary to set out the writ of summons on the record, which determined the time on the face of it. *This relation

can work no wrong, it being incident to tenant in tail to suffer a recovery, as much as to tenant in fee to make a feoffment (h).

3dly, It is objected to this doctrine (viz. that the recovery only executes an old executory use) that this is a new use

vested in the testator by the completion of the recovery. But it is not so considered in *Hudson* and *Benson*, 2 Lev. 28,

1 Mod. 108. It is also said to arise out of another seisin, and therefore is a new use. But the seisin of the recoveror is not

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(f) 3 Ch. Ca. 106.

(g) *Sir John Ferrers* and *Sir John Curson* v. *Sir Rich. Farmer* and others: it is reported in 2 Burr. that the Court repeatedly expressed their approbation of this case.

(h) When the vouches in a common recovery appears in person at the return day of the writ of entry, there the judgment relates to the return day of that writ: but if the vouches appear at the

return day of the *summons ad warrantizandum*, there the judgment relates to the day of the return of that writ. And if the parties are alive at any time of the return day, the recovery will be good; *Shelley's Case*, and *Wynn v. Wynn*; see 5 Crul. Dig. 346, *et seq.*; *Coventry's Rec.* 114. But the judgment cannot relate back to a Sunday; see *Swann v. Broome*, *post*, 496, 526.

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actual, but fictitious; not so much as a seisin for an instant. Were it a real seisin, I concede, that it must be a new use. *Vid. Montagu and Jefferies*, Roll. Abr. (i). [The case stood] over for farther argument, [but] the Court seemed to incline strongly for the defendant, on the footing of the double relation of the recovery, viz. to the bargain and sale, so as to make one conveyance, in point of substance; and to the first day of the Term, so as to become prior to the will, in point of date. But, in Trinity Term following, the Chief Justice declared, that the Court, as at present advised, could not consider the judgment in the recovery as prior to the return of the writ of entry, and directed another peremptory argument, on the first paper day of next Michaelmas Term:—(which see after, Michaelmas,—1 Geo. 3, 1760, pa. 251).

(f) 1 Roll. Abr. 615, pl. 4.

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TRINITY TERM,—33 & 34 GEO. II.—K. B.

OLDKNOW v. WAINWRIGHT.

S. C. & BURT. 1017.

A majority dissent from the election of J. S., but vote for nobody else: the election of J. S. by the minority is good.

ON a special verdict, the question was, whether Segrave, the town-clerk of Nottingham, was legally elected. There were twenty-one electors present; nine of whom voted for Segrave; eleven protested against him, without voting for any one else, and one other said, that "he suspended doing any thing."

It was argued by Mr. *Caldecot*, that this was such a negative upon Segrave, that his election was invalid. Serjeant *Hewit*, *contra*, in Easter Term last: and now, *per tot. Cur.* The election is clearly good. The eleven protestant dissenters, having voted for nobody, could not put a negative upon the only man put in nomination: and *Wilmot*, J., cited *K.* and *Withers* (a), H. 8 Geo. 2; *K.* and *Boscawen* (a), P. 13 Anne; and *Taylor* and the Mayor of *Bath* (b), *temp. Lee*, C. J., to shew, that, where a majority do nothing, but merely dissent, they lose their votes (c).

(a) Cited also in 2 Cowp. 537, and 10 East, 217.

(b) Ibid. and 14 East, 558, n. (a).

(c) See *R. v. Monday*, 2 Cowp. 530.

Votes given for a candidate after notice of his incapacity, are thrown away; *R. v. Hawkins*, 10 East, 211; *R. v. Bridge*, 1 M. & S. 76.

CRAWFORD v. POWEL.

S. C. 2 Burr. 1013.

A MANDAMUS had gone to Powel, to deliver over to Crawford the insignia (*d*) of the office of steward of Harwich, Crawford being chosen his successor. Powel returns, that Crawford had not received the sacrament within a year before his election, according to the corporation act of Charles the 2d (*e*). Crawford brings this action against Powel for a false return. Verdict for the plaintiff, subject to the opinion of the Court. * It appeared, that, by a subsequent statute, 5 Geo. 1 (*f*), the office, in such case, is made only voidable, and not void; and that only by a prosecution commenced within six months after the election; and no such prosecution was had in this case. Therefore the Court held the return to be frivolous and immaterial, and that no action would lie upon such a return; but that a peremptory *mandamus* should have been moved for. And therefore, the main question, viz. Whether the *onus probandi* lies upon the person elected, never was argued in this case (*g*).

Qn. If, on the Corporation Act, the *onus probandi* lies on the person elected?

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(*d*) *R. v. Owen*, 5 Mod. 314; *R. v. Ingram*, ante, 50.

(*e*) 13 Car. 2, st. 2, c. 1, s. 12. See *R. v. Smith*, 3 T. R. 573; *R. v. Brown*, Ib. u. (*b*).

(*f*) C. 6, s. 3, and see *Marten v. Jenkin*, 2 Stra. 1145, and 2 Cowp. 539, per Lord Mansfield.

(*g*) But it appears from the report in 2 Burr. 1013, that judgment was given for the plaintiff, thereby shewing it was not necessary for him to prove that he had taken the sacrament within the time prescribed: and Lord Mansfield said, that

since 5 G. 1, the election being not void, but voidable, in case of a removal or prosecution within six months, which had not been in this case, the plaintiff's election stood confirmed and became absolute: and he distinguished it from the case of *Tyfton v. Nevins*, 2 Ld. Raym. 1354, where the plaintiff, being out of possession, brought a *mandamus* to swear him into office, and it was held to be incumbent on him to prove, that he had received the sacrament as required. See *Powell v. Milbank*, post, 851, and next case.

THE KING v. PEMBERTON.

S. C. 2 Burr. 1035.

MOTION to quash an indictment for exercising the trade of a tanner, contrary to the 5th of Elizabeth (*h*). There is a statute, 1 Jac. 1, c. 22, which exempts tanners from this prosecution, in several circumstances; and this motion was grounded on the omission in the indictment, to set forth the negative of those several circumstances; as in convictions on the game laws it is necessary to set forth, that the defendant had not 100*l. per annum*;—was not the eldest son, &c. (*i*). The Court

Exemptions from a penal law may be given in evidence on Not Guilty; and the negative need not be set forth in the indictment.

(*h*) C. 4, s. 31, which act, Lord Ellenborough said, was to a considerable degree defunct; 3 M. & S. 190: and this section is now expressly repealed by 54 Geo. 3, c. 96, s. 1.

(*i*) Though it is necessary to negative in the conviction the several qualifications, yet it is not necessary to disprove them by evidence; but the *onus probandi* lies on the defendant, to prove, if he can, that he

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held, that exceptions of this kind are to be taken advantage of in evidence on Not Guilty, and therefore refused to quash the indictment (k).

is qualified; *R. v. Turner*, 5 M. & S. 206. The same rule applies to actions on the game laws; the plaintiff must aver the want of qualification in his declaration; per Lord Mansfield, 1 T. R. 144; per Heath, J., 1 B. & P. 468. On a conviction for selling ale without a license, the informer is not bound to produce evidence to negative the existence of a license; the

defendant must shew his license, if he has one; *R. v. Hanson*, 1 Paley on Convictions, by Dowling, 45, from the Editor's MS. note. See also *R. v. Marsh*, 4 D. & R. 260, 2 B. & C. 717.

(k) See 2 Hawk. P. C. c. 25, s. 115; and *R. v. St. George's, Hanover Square*, 3 Camp. 222; and the preceding case.

THE KING v. REYNALDS.

Defendant removing an indictment by *certiorari* without good cause, cannot be admitted in *formd pauperis*.

DEFENDANT was indicted at Hick's Hall, and removed the indictment, by *certiorari*, into the King's Bench; and now moved to be admitted to defend in *formd pauperis*, on the usual affidavit. But the Court held, that this was not within the statute (l), but was merely a case at common law, and therefore discretionary in the Court:—that there might be instances in which a *certiorari* might be necessary, as for an impartial trial, and then there could be no objections to admitting the defendant in *formd pauperis*. But where he voluntarily removes it himself, without any cause shewn, he shall not put the prosecutor to an extraordinary expence, and keep himself clear by being admitted a pauper (m). He shall not be vexatious, merely because he is poor. Serjeant *Hewit*, who made the motion, withdrew it.

(l) 11 H. 7, c. 12.

(m) But the Court in its discretion will allow a defendant in a misdemeanor to defend in *formd pauperis*, where the indictment has not been removed by *certiorari*: because, if the defendant be convicted, he is not liable to pay costs to the prosecutor; *R. v. Wright*, Ca. temp. Hardw. 211, 253, 2 Str. 1041. But in civil actions, he is never permitted to defend in *formd pauperis*; because he is liable to the plaintiff for costs, and the provision of 11 H. 7, c. 12, only extends

to plaintiffs; *Anon. Barnes*, 328 (8vo. ed.); Hull. Costs, 229 (ed. 1810). It may be therefore inferred, that a defendant on an indictment removed by him by *certiorari* would not be allowed to defend in *formd pauperis*, inasmuch as he is obliged by 5 W. & M. c. 11, to enter into a recognizance to pay costs to the prosecutor.

A defendant may plead a pardon in *formd pauperis*; *R. v. Morgan*, 2 Str. 1214; but will not be admitted so to defend on an attachment for contempt; *R. v. Pearson*, 2 Burr. 1039.

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HERN v. HOWARD.

Attorney, sued in a foreign Court, and lying by for a long time, waives his privilege.

DEFENDANT was an attorney of Common Pleas, and was sued in King's Bench, by bill of privilege, supposing him an attorney of this Court, which his son actually was. The plaintiff, after serving him with notice of a declaration, and signing judgment by default, found out his mistake; but defendant's son, in order to gain time, assured the plaintiff, that his father

would take no advantage of it; which induced the plaintiff to stay two Terms, in hopes of receiving his debt. But now, on the plaintiff's giving notice to execute a writ of enquiry, defendant moved to set aside the judgment for irregularity. And upon shewing this whole matter for cause, the Court thought that, by lying by so long, the defendant had waived his privilege (a); and therefore discharged the rule for shewing cause, with costs.

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{ *Oliphant's Case*, about ten years ago,
was cited for the defendant.

(a) For he ought to have taken advantage of that by plea in abatement; the rule at that time being, that where a defendant, attorney of one Court, is sued by process out of another Court, he must plead his privilege in abatement, and if arrested, must put in special bail; *Lane v. Saltmarsh*, 2 Salk. 544; Mayor of *Basingstoke v. Bonner*, 2 Stra. 864; *Snice v. Humphreys*, 1 Wils. 306; *Cressley v. Shaw*, post, 1085: but if he be arrested by process issuing out of his own Court, then he may be discharged upon motion, and if arrested, upon filing common bail; *Redman's Ca.*, 1 Mod. 10; *Wheeler's Ca.*, 1 Wils. 298. But that distinction does not now exist: for if an attorney be sued in a foreign Court, such Court will stay proceedings, or discharge him on entering a common appearance, without putting him to plead his privilege; *Tidd's Pr.* 219 (ed.

1821). An attorney defendant waives his privilege, when he is sued, by not claiming it in due time; *Cressley v. Shaw*, post, 1085: and loses it when sued *en autre droit*; *Gage's Ca.*, Hob. 177; *Newton v. Rowland*, 1 Salk. 2, 1 Ld. Raym. 533; or jointly with his wife; *Roberts v. Mason*, 1 Taunt. 254; or indeed with any other person not having privilege; *Branthwaite v. Blackerby*, 2 Salk. 544; even though the nature of the action be several, as trespass; *Pratt v. Salt*, 5 Bac. Abr. 619, *Privilege*, (B) 3. But he does not lose it, if he be sued by bill jointly with a person having privilege of Parliament; *Ramsbottom v. Harcourt*, 4 M. & S. 585: nor when sued as acceptor of a bill of exchange; *Comerford v. Price*, 1 Doug. 312; nor when sued as a magistrate; *Duffy v. Oakes*, 3 Taunt. 166.

THE KING v. REEVE, MORRIS, OSBORNE, *et al'*.

S. C. 3 Burr. 1040.

MOTION for a *certiorari* to remove convictions before Mr. Moneyppenny, a Kentish justice, on the statute 22 Car. 2 (o), against conventicles (the defendants being methodists) and also the proceedings on the appeal to the Quarter-Sessions, pursuant to the directions of the statute, which orders such appeal to be final, and that no other Court shall interpose.

Certiorari cannot be taken away by any general, but only by express, negative words.

Norton, Stowe, and *R. Leigh*, argued, that the power of this Court to grant a *certiorari* was not taken away by these words. That all inferior jurisdictions are under the inspection of this Court, whose power can't be taken away, but by express negative words: *Dr. Foster's Case*, 11 Rep. (p); *Smith's Case*, 1 Vent. 68 (q).—That, the objects of this act being only persons above sixteen, and natural born subjects of this kingdom, if the defendants should prove not to be such, they are not the

(o) C. 1; now repealed by 52 Geo. 3, c. 155, s. 1, which contains the several regulations touching dissenters and conventicles now in force.

(p) 64 b.

(q) 1 Mod. 44, S. C.; *Cates q. t. v. Knight*, 3 T. R. 443, S. P.

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object of the inferior jurisdiction; and the Court will interpose, *by virtue of their general superintendant power, to see whether they are so or not. That in a revenue case, before *Ryder*, C. J., it was determined, that no words of *being final*, &c. will preclude the King's Bench, unless *certiorari* be expressly taken away.—That some of the convictions are under 10s. where no appeal lies to the Sessions. Shall the justice be the sole and arbitrary judge of these? Sir *Edward Saunders's* reading upon this statute, *temp.* Car. 2, is the only book of law that allows him so uncontrollable an authority.—That, though the justices' jurisdiction may be final in point of fact, yet not so in case of irregularity. [In] *Peat's Case*, 6 Mod. 228, a conventicle case, it was said, "if the justices wrong you, you may have remedy by *certiorari*."

Knowler and *Filmer* shewed for cause;—that a *certiorari* can't go to the justice, because he has returned all the convictions to the Sessions, and they are there filed.—That *certiorari* will not lie to remove proceedings at common law, but only summary convictions. This not a summary conviction, with respect to those of above 10s.; because those on appeal are traversable and triable by jury: A writ of error therefore would be the only proper remedy.—The statute is ordered to be taken largely and beneficially against conventicles.—There is another clause, that warrants, &c. are not to be reversed for want of *form*.—The penalties have been all distributed as the law directs, to the King, the informer, and the poor. Who can call it back again? Will this Court meddle with the King's revenue? And will they interfere, without being able to do complete justice, by commanding restitution?—If the justices had no jurisdiction, there is a remedy by action; but, by the appeal, they have affirmed the jurisdiction.—The books furnish no instance of this Court's having ever interposed.—The negative clause can only extend to the King's Bench; no other Court could ever interpose, with regard to proceedings at Quarter-Sessions;—the statute of Geo. 2(r), orders, that justices shall have notice of moving for *certiorari*, in order to oppose it, if necessary. Why is this ordered, if *certiorari* be always grantable?—If a *certiorari* issues improvidently, and is afterwards set aside, it is still a great grievance to the party; [*233] for no costs can be given in *such a case, as was determined in the *King* and *Wakefield*, a few Terms ago.

LORD MANSFIELD, C. J.—There is no colour, that these negative words should take away the jurisdiction of this Court to issue writs of *certiorari*. They will perhaps take away the writ of error that has been mentioned. But this Court hath an inherent power to issue *certiorari's*, in order to keep all inferior Courts within due bounds, unless expressly forbid so to do, by the words of the law. If the justices have done right

(r) 13 Geo. 2, c. 18, s. 5. And see *R. v. Battams*, 1 East, 298; and *R. v. Just. of Sussex*, 1 M. & S. 631, 734.

below, you may shew it, and quash the *certiorari*. But if there be the least doubt, this Court will grant the writ.

Certiorari granted per tot. Cur. (s).

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(s) 2 Hawk. P. C. c. 27, s. 23; *R. v. St. Andrew's, Holborn*, 3 Burr. 1458; *R. v. Jukes*, 8 T. R. 542, *acc.*; in which last case, Lord Kenyon said, that the *certiorari* being a beneficial writ for the subject could not be taken away without express words, and that it was much to be lamented in a variety of cases, that it was taken away at all: *quod nota*. See also *R. v. Hanson*, 1 Paley on Conv. by Dowling, 298, n. [2]. A *certiorari* is granted of course on the application of the Crown, *i. e.* of the prosecutor; but not so on the application of a defendant, who must shew some ground for it by affidavit; *R. v. Eaton*, 2 T. R. 89; 4

Burr. 2468, S. P. It is a rule absolute in the first instance. A *certiorari* lies where a writ of error does not lie; *per Holt*, C. J., 1 Ld. Raym. 469; therefore where judgment has been given on an indictment, a *certiorari* does not lie, but the record must be removed by writ of error; *R. v. Seton*, 7 T. R. 373. And it seems that, in general, a *certiorari* will not be granted to remove an indictment after conviction; 2 Hawk. P. C. c. 27, s. 31; *R. v. Jackson*, 6 T. R. 145; but see 1 Burn's Just. 450 (ed. 1820): and see *R. v. Reynolds, ante*, 230.

WALLEN, *qui tam*, v. HOLTON.

INFORMATION at last Berkshire assizes against the defendant for exercising the trade of a baker, contrary to the statute 5 Eliz. (t). It appeared in evidence, that he had followed it twelve years, but had never been an apprentice, nor served with any person *as* such. On a case reserved, Baron Adams, before whom it was tried, consulted the eleven Judges; who all joined with him in opinion, "that exercising a trade "seven years, without any prosecution with effect, was a sufficient qualification;" and accordingly, he ruled it for the defendant, at his own chambers, 20 June, 1760. *Ex relatione Mri. Aston*, counsel for the plaintiff.

Exercising a trade seven years, without any prosecution with effect, a sufficient qualification.

(t) C. 4, s. 31, now repealed: see n. (A), *ante*, 230.

THE KING v. BOMASTER *et al*.

S. C. 2 Burr. 1039.

THE defendants lived at Portsmouth; and articles of the peace were exhibited against them, in this Court. It had been the usual practice, that defendants, in such cases, must personally appear and give bail to the attachment here. But the present defendants living at such a distance, that it would be oppressive to bring them up upon such an errand; the Court *ordered the attachment to be indorsed, that it should be bailable before the justices of the peace in Hampshire, in a stated sum, to be regulated by the discretion of the Court; and laid this down as a general rule, to be observed in all similar cases for the future (v).

Attachment upon articles of the peace in King's Bench bailable before justices of the county.

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(v) It appears from the report in Burrows, that the practice had been to direct a *mandamus* to a justice to take the security; *R. v. Lewis*, 2 Stra. 835, S. P. And in one case the Court rejected articles of the peace, because the exhibitant had not

applied or endeavoured to apply to a justice in his own neighbourhood. *R. v. Waite*, 2 Burr. 780. As to articles of the peace, see 1 Hawk. P. C. c. 60; 5 Burn's Just. 283, (ed. 1820).

ROBINSON v. BLAND.

S. C. 2 Burr. 1077, Bull. N. P. 274.

Qs. If a gaming debt, won in France, is recoverable in England. *Post*, 260.

ASSUMPSIT by the plaintiff, against the sister and administratrix of Sir John Bland, on a bill of exchange drawn by the intestate, at Paris, upon himself in England, 31st August, 1755, for 672*l.*, payable to the order of the plaintiff, which was laid in the declaration to be accepted at Westminster by the intestate. Two other counts, 2*d.* For money lent and advanced by the plaintiff; 3*d.* For money had and received by the intestate, to the plaintiff's use. Plea, *Non assumpsit*. At the trial, before Lord Mansfield at Westminster, in the sittings after Easter Term, a verdict was found for the plaintiff, with 672*l.* damages; subject to the opinion of the Court, on the following facts proved or admitted:

"That the bill of exchange was given at Paris for 300*l.*, there lent by the plaintiff to Sir John Bland, at the time and place of play; and for 372*l.* more, lost at the same time and place by Sir John Bland, to the plaintiff, at play. That the play was very fair, and there is not any imputation whatsoever on the plaintiff's behaviour. That there were several gentlemen and persons of fashion then and there at play, besides the plaintiff and Sir John Bland. That in France, money lost at play between gentlemen may be recovered, as a debt of honour, before the marshals of France; who can enforce obedience to their sentences, by imprisonment;—though such money is not recoverable in the ordinary course of justice. That money lent to play with, or at the time and place of play, may be recovered there as a debt in the ordinary course of justice, there being no positive law against it. That Sir John Bland was, and the plaintiff is, a gentleman.—*Question*. Whether, under these circumstances, the plaintiff is entitled to recover any thing, and what, against the defendant?"

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This cause, being set down in the paper, was argued this Term, by Serjeant *Hewit*, for the plaintiff.

The question is, Whether the 300*l.* lent, and the 372*l.* won, out of the kingdom, can be recovered in it. If the action cannot be maintained, it must be for want of a good consideration, or else because there is some positive law against it. 1*st.* There is no doubt but the 300*l.* lent is a good consideration: And the 372*l.* won is not an unlawful consideration; it is not *malum in se*, provided it be fair, as the present was. Gaming is not a crime, [and] has naturally no moral turpitude. Domat. l. 2, sect. 2, fol. 22. 2*dly.* Upon the footing of positive laws, the old statute 33 Hen. 8, [c. 9,] makes a distinction between gentlemen and others. Under the statute of 16 Car. 2, c. 17, sums under 100*l.* might be lawfully won here in England. (Statute 9 Ann. c. 14, restrained it to 10*l.*) There was then no positive law, to restrain winning less than 100*l.* *Dixon* and *Pawlet*, 1 Salk. 345; *Stanhope* and *Smith*, 5 Mod. 351. There is therefore no vice

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in the contract, unless made so by a positive law; and the laws of France authorise this kind of contract, and give a remedy to enforce it. In France, the *point d'honneur* is as much a law as any other, and is regulated by express laws. See *M. Brouillon* on that subject. The laws of foreign countries are adopted by the law of England, with respect to contracts made abroad. *Daws and Pindar*, 2 Mod. 45; *Blankard and Galdy*, 4 Mod. 222, held, *that the statute of Ed. 6, respecting the sale of offices does not extend to the islands of Barbadoes and Jamaica, nor can be pleaded to a suit brought here, for the money so contracted to be paid. *Feaubert and Turst*, Pr. Chanc. 207(u); *Fremoult and Dedire*, 1 P. Wms. 431; a marriage contract, directing the wife's fortune to be distributed after her death, according to the custom of Paris, established in the House of Lords. Statutes concerning usury do not extend to contracts made abroad. Lord *Dungannon* and *Hackett*, 1 Equ. Cas. Abr. 289; Irish interest allowed on an Irish bond; and said, that, in all cases, interest must be paid, according to the law of the country where the debt is contracted, and not of that where sued for. *Ellis and Lloyd*, Ibid., interest of the Leeward Islands, 10 per cent, allowed in Chancery. *Lane and Nicols*, Ibid., Turkish interest allowed on a contract in Turkey. *Harvey and East India Company*, Ibid., Indian interest, 12 per cent, allowed on a contract in India(w). By stat. 24 Geo. 2, c. 40, sect. 12, no debt for spirituous liquors under 20s. shall be recoverable in any Court(x). It would be absurd to suppose, that this extends to a contract made in a foreign country. Suppose a sumptuary law was established in England, declaring all contracts void for clothes above such a price. Should a debt be contracted in France for clothes of a higher value, and the debtor should come to England: Would not our law punish the breach of a contract, which was lawful where made, and compel the debtor to pay the debt? Therefore, where the matter of the contract is not absolutely *malum in se*, our prohibitory laws only extend to it, when made at home; but will not, as in the present case, vitiate by a matter *ex post facto*, a contract lawful at the time and place of making it. Besides, how shall this law be enforced? It inflicts penalties on persons winning above 10l. at a sitting, to be distributed among the poor of the parish. What parish can be *entitled to this forfeiture, for a transaction that happened at Paris? Upon the whole, as the consideration is a lawful one, and as the laws of the country would have compelled payment of the debt; it is hoped, that the change of place, where the action is brought, will not make an alteration in the law, but that the plaintiff shall recover his whole demand.

Blackstone, for the defendant argued, 1st. That a contract made in France, and allowable by the general law of that country, is not binding here in England, when contrary to an

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(u) 1 Bro. P. C. 129, (2d ed.) S. C. (w) See *Bodley v. Bellamy*, post, 267.

(x) *Burnycott v. Hutchinson*, 5 B. & A. 241.

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express prohibition of our own statute law. 2dly. That such a contract, not allowable by the general law of that country, but only recoverable under the special circumstances here stated, is not binding in this kingdom, when contrary to a similar prohibition of our own statute law. The first extends to both parts of the question, both the money *lent* and the money *won*, at gaming. The latter only to the money *won*.

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1. It is not contended, that our laws are so far independent of others (y), that they take no notice of the law of France, with regard to contracts, &c. arising there; though this is agreeable to the strict notion of a civil or municipal law, *jus quod quisque sibi populus constituit*. And Lord Coke lays it down, 2 Inst. 98, that foreign precedents are not to be objected against us, because we are not subject to foreign laws. This, unless properly understood, a very narrow principle, fit only for the first rudiments of a state. From mutual commerce and intercourse, which will quickly follow, arises the necessity not only of a law of nations to regulate that commerce and intercourse, but also of communicating in some degree with the laws of other countries, in respect to the contracts of individuals; in order to give a rule for traders *hinc *inde* to resort to, for the decision of their mercantile controversies. Therefore the *lex mercatoria* was interwoven into our own common law so early as 3 Ed. 1. 2 Roll. Rep. 114. Molloy de jure marit. l. 2, c. 12, sect. 7. But the present is no mercantile question, but a transaction between two Englishmen happening to be at Paris together, clear of any commercial connexions. It is also acknowledged, that where any matter has been legally determined abroad, *ubi transit in rem judicatam*, our Courts will not again take cognizance of the cause, but the sentence, however hard it may appear, is conclusive between the parties; Finch. Rep. 186; 2 Show. 232; Raym. 473; Skin. 59; 1 Roll. Abr. 530 (s). But this is not the case here; this is absolutely *res integra*.

Yet farther; a regard has been often paid, not only to sentences obtained abroad, but to the foreign laws upon which such sentences might have been obtained, with respect to contracts arising in other nations. For the parties, at the time of contracting, must be supposed to refer to the law of the country, in which such contract was made. Here the law of England adopts the foreign law, *pro hac vice*; just as it adopts the *local customs* and *special usages* of many cities and districts here at home in similar cases; by way of temporary exception to the general universal rule of common law. This is a large, equitable principle of justice;—but may be carried too far. Some stop is necessary, else our laws would be frequently involved in contradiction and absurdity, by acting counter to those positive rules it had found necessary to establish, for the internal policy of government. The line which has been drawn, and

(y) See 1 Cowp. 174, *Folliott v. Ogden*, 1 H. Bla. 123 and notes; *Phillips v. Hunter*, 2 H. Bla. 402, 410; *Potter v. Brown*, 5 East, 124; Ex parte *Burton*, 1 Atk. 255.

(z) *Roach v. Garvan*, 1 Ves. S. 157; *Burrows v. Jemino*, 2 Stra. 733; *Walker v. Witter*, 1 Doug. 1, and notes; *Tarleton v. Tarleton*, 4 M. & S. 20; Bull. N. P. 245.

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the distinction upon which I shall rely, is that foreign laws are to be regarded in England, only where they vary from the general common law: and not where they contradict express prohibitory statutes. This is a reasonable distinction. In all general affirmative laws a variety of exceptions are admitted, as being either, first, cases not in the contemplation of the Legislature, whose want of foresight the equity of the Courts must supply; or, secondly, too *minute to be attended to, in forming a general rule; and therefore equity (according to Grotius), is the correction of that wherein the law, by virtue of its universality, is deficient. Upon one of these accounts the Courts have admitted local customs and particular usages to prevail in derogation of the common law; or, what is much the same thing, foreign laws to guide the decision of controversies arising abroad, however different from the general rules of the municipal law. But, where there is an express prohibition by statute, where the Legislature has peremptorily exploded this or that doctrine, or invalidated this or that contract; no want of attention or foresight can be presumed. The Legislature is the best and only judge what rule of right shall be established, and having declared its sentiments by a strong negative precept, there is no power which ought to resist it. Accordingly, the cases relative to this point (except those of usury, which go upon a different principle), are all of them exceptions to the general common law, and not to particular acts of Parliament. *Daws and Pindar* (a), was only argued, and never determined; but is the same point with *Blankard* and *Galdy* (b), wherein the only question was, whether the statute law of England extended to the Leeward Islands, without naming them in special; and it being held that it did not, it followed of course, that a statute, which extended only to a sale of English offices, could not vitiate a contract for an office in Jamaica. These cases therefore prove nothing material. *Feaubert* and *Turst*, *Fremoult* and *Dedire* (c), (and a number of others not cited by Mr. Serjeant), were all questions upon the general common law, and not upon any negative statute. Wherever our Courts have taken cognizance of foreign transactions, and in consequence have sometimes admitted foreign laws to be given in evidence, they have always recourse to a fiction (d). The plaintiff declares that the contract was made or completed in England; as in the present case, that the acceptance of the bill of exchange was at Westminster. This, though false in fact, is not traversable; Co. Litt. 261 b; *Capp's Case*, 2 Roll. Rep. 492. Now it would be strange, if a mere fiction *should be allowed to militate against the express will of the Legislature, that a contract feigned to be made at Westminster should be valid, when, if really made there, it would have been vicious. If a man avails himself of a fiction, he must pursue it through all its consequences. He must not take the benefit of our law in one

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(a) 2 Mod. 45.

(b) 4 Mod. 222.

(c) Cited *ante*, 236.(d) See Lord Mansfield's judgment in *Mostyn v. Fabrigas*, 1 Cowp. 176.

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part, and reject it in another. An *affirmative* statute will destroy a local custom inconsistent with the provisions of the act. *City of London and Gatford*, 2 Mod. 39; *Freem*. 203; a custom in Southwark to appoint scavengers at the court-leet was held to be taken away by the statute 14 Car. 2, which appoints a new method of doing it. *A fortiori* a *negative* statute, which declares such usage void, will invalidate a local custom. And if it will destroy a domestic custom, which is *lex loci*, shall a foreign law be allowed to withstand it? There are two branches of the statute 9 Ann. [c. 14.]—One which gives an action to the loser, and another which prohibits the action of the winner. I do not contend that the penal part of this statute extends to a transaction in France; therefore all the absurdities (with regard to the poor of the parish, &c.) put by Mr. *Serjeant* are out of the present case. But where a plaintiff prays in aid of our law to recover a gaming debt contracted abroad, the prohibition of the statute shall then take effect. He shall not employ the process of our law, to subvert its own constitutions. Statute 9 Ann. is extremely strong. It vacates all securities whatsoever, where the whole or any part of the consideration is for money *won*, or *lent* at gaming; *any statute, law, or usage* to the contrary notwithstanding. How then can the *law* or the *usage* of France be set up in opposition to this statute? If once it be laid down for a rule, "that this Court will compel the performance of contracts made abroad, though contrary to the express provision of our own statute law," it must be laid down *generally* and in its *full* extent. Gaming contracts are not entitled to any special indulgence. The consequence of this would be absurd. *Stock-jobbing contracts (e), contrary to 7 Geo. 2, c. 8, if made in France, shall never surely be recoverable in England. This would introduce all the mischief of that pernicious practice afresh. Statute 12 Geo. 2, c. 21, vacates all insurances made on the exportation of wool. If such an insurance be made in Holland, shall either party come over to England and demand your Lordship's assistance to compel the execution of such a contract? Even in 13 Ed. 4, when it was held that our general laws did not bind merchant strangers, it was said that statutes for the forfeiture of merchandize did. Bro. *Denixen*, 5; Fitzh. *Denixen*, 2.—The Marriage Act 26 Geo. 2, c. 33, s. 13, prohibits all suits to compel a marriage in consequence of any previous contract. If two English subjects should contract themselves in France, Jersey, Ireland, or Scotland, and on their return one should institute a suit against the other for performance of this foreign contract, would not a prohibition be instantly issued to restrain it? These instances only flow from the reason of the thing, and have never been judicially resolved. But, in another instance, the statute of limitations has been frequently allowed to operate upon transactions arising abroad: *Beven and Clapham*, 1 Lev. 143; *Davis and Yale*, Lutw. 946; *Duplein and De Rouen*, 2 Vern. 540.

(e) As to stock-jobbing transactions, see *post*, 633.

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And if this statute be allowed to operate upon foreign debts, where trade may be affected; *a fortiori* other statutes may operate thereon, where trade is out of the question. Had the plaintiff delayed this action one year longer, we might have availed ourselves of the statutes of limitation; and why not at present of the statutes for discouraging gaming? As to the statutes of usury, I allow the law to be as stated by Mr. *Serjeant*. But this does not depend upon this principle, that our statute-law cannot operate upon foreign contracts, but upon peculiar reasons of its own, which make it necessary that laws for regulating the rate of interest must be merely *local*. The rate of interest in every country depends upon a multitude of *local* circumstances; *e. g.* it must be higher or lower according to the scarcity or plenty of current specie. What therefore is moderate interest in one country may be *usury and extortion in another. And unless the rule of determining foreign contracts respecting interest be guided by the rate of interest in the place where the contract is made, no foreigner would contract with an Englishman, which would put a stop to all foreign trade, which is supported by mutual credit. The preambles to stat. 12 Car. 2, c. 13, and 12 Ann. st. 2, c. 16, both of them give reasons merely *local* for the reduction of domestic interest from eight to six, and from six to five *per cent*. And it is the policy of this kingdom, as a trading state, not to discourage the high interest payable abroad, by extending the operation of our statutes to such foreign contracts; so that the balance of commerce may be every where in favour of our own merchants. As to the argument drawn from the statute against spirituous liquors, it has never been so determined. But if it had, the purview of this statute is also evidently *local*. It is calculated to throw a check upon dram-drinking, by preventing a score in a London gin-shop: but it is morally impossible, that it can ever be worth while to bring a foreign debt of this value before any of our English Courts. The like answer will serve to the supposition of a sumptuary law, &c. It is only a supposition; and were it to prevail in fact, I have an equal right to suppose that the debt would not be allowed. If I am right in this branch of the argument, it puts an end to the whole question; neither the money *lent*, nor *a fortiori* the money *won*, are recoverable by the judgment of this Court. But as it is impossible to foresee what weight these reasons will have, I must proceed to argue, secondly,

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II. That a contract made in France, and not allowable by the general law there, but only under the special circumstances here stated, is not binding in our Courts, when contrary to an express prohibition of our own statute law. This only extends to the money *won*, to 372*l*. For though I should be right in this point, yet it will not affect the 300*l*. *lent* * at the time of play, any farther than as it is coupled with the other in the same security, the whole of which is void, if part of the consideration be bad.

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Here the general constitutional law of France agrees with

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OUR OWN. It is opposed by the whimsical decisions of an arbitrary partial jurisdiction, governed by no written or permanent law, extending only to gentlemen and injuries of honour. I allow that the payment of gaming debts is reckoned in France among the *points d'honneur*: they had it from their German ancestors. *Ea est in re prava pervicacia, ipsi fidem vocant*; Tac. de Mor. Germ. xxiv. A refusal to pay would be a cause of challenge.—Therefore, to prevent murder, this jurisdiction is permitted, as being the less evil of the two. Our law pays a regard to the general law of foreign countries, not to any special excentric customs. We have a Court in England, called the Lawless Court, *Curia sine Lege(f)*, which, like this of the Marshals of France, is governed by no settled law.—The proceedings are carried on by whispering; they have no pen and ink, but only a piece of charcoal; and every suitor that appears not, forfeits double his rent every hour. The same regard that the Courts of France would pay to this extraordinary Court, in a suit for this forfeiture there, may be paid to the Court of the Marshals in our country. Let them execute their own process, but not attempt to guide the judgment of an English Court of law. Private foreign Courts, though governed by settled laws, are never attended to in England; *Tourton and Flower*, 3 P. Wms. 371; held by Lord *Talbot*, that our Courts can take no notice of what is done in the spiritual Courts beyond sea. This is stated to be merely a debt of honour. Can our Courts of common law give relief in matters of honour arising in a foreign country, when they clearly cannot do it at home? Court of Constable and Marshal “may hold plea of matters of honour” here, which they could not do “if they might be discussed by the common law.”—

[*244] Stat. 8 Ric. 2, c. 5; Hale’s Hist. Common Law, 37 (g). *Again: This Court acts only *in personam*, not *in rem*; by imprisonment of the body, not seizure of the effects. But if this suit be allowable in Westminster Hall, the plaintiff has a remedy both against the *body* and the *effects*. And shall he have a better remedy here than abroad, for a debt set up in opposition to the laws of this country? All special customs must be construed strictly. And the jurisdiction of this Court is not stated to extend to executors or administrators. Nor indeed can it. It takes cognizance only of debts of honour; which die with the person. No man’s honour is testamentary, or can vest in his personal representatives. There will be a perpetual deficiency of assets. Our articles of the navy and of war allow an officer to be cashiered for not behaving like a gentleman. If a maxim should prevail in Courts martial, that non-payment of gaming debts is unbecoming the character of a gentleman, and they should resolve to break every officer that refused: this would be as compulsory a process as the imprisonment of the Marshals of France. But would this be sufficient to ground an action upon in the King’s Bench for payment of a

(f) Jacob’s Law Dict., and Camd. Britt. 441.

(g) Bp. 40, 41, (ed. 1820).

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note obtained upon such a consideration? If not, and it would not be sufficient to recover money lost on board the fleet, when in harbour or hovering upon the coasts of France, why should it be sufficient if they were actually landed on the continent? Where is the difference between money lost by one British officer to another in the camp in England or the camp in Germany? Our Courts have been always very laudably strict in supporting the statutes against gaming. *Hussey and Jacob*, Carth. 356; (reported also in Salk. 344, 5 Mod. 175, Comyns, 4); the acceptor of a bill of exchange, though a third person, allowed to plead the statute against gaming, to avoid his own acceptance of a gaming draught. *Holt* indeed said, according to some of the Reporters (not Carthew), that had the bill been indorsed over by the payee, the indorsee might have recovered it. But in *Bowyer and Bampton*, Stra. 1155(h), *Holt's dictum* is denied to be law. The Court, after two solemn arguments, determined that the innocent indorsee of a gaming note could maintain *no action against the drawer. "For it would be of [*245] "some use to the lender, if he could pay his own debts with "it, and it will be a means to evade the act. And though it "will be some inconvenience to an innocent man, (who, however, may sue the indorser), yet that will not be a balance to "those on the other side." The present case is that of the original winner and lender, and therefore much stronger; and the reasons are at least equally applicable to this case as the other. It is suggested, that this is a positive law.—That there is no vice in the contract, no moral turpitude in fair gaming.—But is there any in stock-jobbing, in insuring the exportation of wool, in a marriage contract, or in suing out an original after six years are expired? Yet no transaction of this kind will be countenanced in our Courts, whether the cause of action arose at home or abroad. It is not a *necessary* ingredient to vitiate a foreign transaction, that it must be accompanied with moral turpitude. Reasons of foreign or domestic policy will make it frequently improper to enforce a contract against the positive law of the state. But is there no degree of moral turpitude in *excessive* gaming, such as risking 700*l.* at a sitting? There is at least extravagance, and probably distress to a man's self, his family, and dependants in every relation of life. Gaming to excess gives a loose to every furious passion that deforms the human mind. What this excess is, the laws have ascertained. In gentlemen, by stat. Car. 2, it was 100*l.* at a sitting, by 9 Anne, it is 10*l.*; in tradesmen, by the bankrupt laws, it is 5*l.*(i). This Court will not give a sanction to this fashionable vice, nor suffer our travelling nobility and gentry to fall a more easy prey to it than they are already. If they lose only *ready money* in France, our laws indeed cannot assist them; but the loss is then limited, and the consequence less

(h) See the observations on that case, *Edwards v. Dick*, 4 B. & A. 212.
in *Lowe v. Waller*, 2 Doug. 741: also (i) 5 G. 2, c. 30, s. 12.

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pernicious. But gaming *on trust* is big with a ruin, which in its nature cannot be computed. * If a distinction be made between the money *won* and money *lent* at play, it will introduce all the mischief that the public suffered under the statute of Car. 2, and which the statute of Anne was intended to remedy. No man would then *play* upon trust; but would lend his money first, and afterwards win it back again. Because the law of France is imperfect, and only half remedies this evil, shall we not avail ourselves of the law of England, which has provided a remedy adequate to the mischief? On the whole, I hope the Court will be of opinion, that the plaintiff is not entitled to recover the whole, or any part, of a debt, that has been thus contracted.

Lord MANSFIELD, C. J.—This is a case of great consequence with regard to the principles upon which it must be determined. I should therefore desire to hear another argument; and as the present topics are exhausted, I would throw out a few hints, to be spoke to the next time. There is a distinction between *local* and *personal* statutes. *Local* ones regard such things as are really upon the spot in England; as the statute of frauds, which respects lands situate in this kingdom. So stock-jobbing contracts, and the statutes thereupon, have a reference to our local funds. And so the statutes for restraining insurances upon the exportation of wool respect our own ports and shores. *Personal* statutes respect personal transitory contracts, as common loans or insurances. *Qu.* Whether our stamp laws would operate on such contracts made abroad (*k*)? Another question may be, Whether the loan or contract is avoided, or only the security? Another question may arise upon the statute against sale of offices, Whether that extends to foreign countries? Next, as to the particular jurisdiction of the Marshals of France. *Qu.* Its extent and power over executors and ad-
[*247] ministrators? And does not the bill of exchange vary the case? Would not Sir John Bland's being liable to imprisonment, be a good consideration of his giving the bill of exchange? I deliver no opinion, but wish these points may be considered.

DENNISON, J.—This case and the law upon it are quite new to me. I can form no opinion about it: But desire it may be considered, in case a man has won a gaming debt abroad, and brings his action in England, will it be material to assign the place where the money was lost or not?

Lord MANSFIELD, *iterum*.—Let it also be considered, how it would stand, in case it had been money lost between two foreigners, and indorsed over to a person in England. Or whether it makes any difference, that these are two subjects of England residing in foreign parts.

FOSTER, J.—I desire also it may be fully considered, whether it was the intention of the act, that persons might evade

(*k*) *Aloes v. Hodgson*, 7 T. R. 241; *Clegg v. Levi*, 3 Camp. 166; 55 G. 3, c. 184, s. 29.

the statute, merely by gaming abroad. The statute 9 Ann. puts a negative upon all *usages* to the contrary. Does it not extend of course to the *usage* of France?

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WILMOT, J.—There seems a material difference between the money *lost* and the money *lent*. There is also a difference between the wording of statute Car. 2, and statute of Anne. The former extends only to money *lost*, but then it extends to all *contracts*. The latter extends also to money *lent*, but it only mentions *securities*. Perhaps this was intended to prevent the giving of sham securities, to blind the real consideration of the debt. In *Slater and Emerson*, 1 Geo. 2, this difference was taken by Eyre, C. J., at *Nisi prius*. *As to the money *lost*, I have great doubts about it. I have been staggered, since I came into Court. I thought, *prima facie*, it was within the reason of the statutes of usury. But the reasons given to the contrary have great weight with me. I think, we cannot look into the principles which must govern this case too narrowly. I wish the laws of other nations might be looked into. Almost all of them have pursued the civil law; and the code *de aleatoribus* vacates such contracts on gaming. It would be strange, to give the law of France a more liberal construction than it has at home; to give a gaming creditor, a real (by *elegit*) instead of a personal security. Let it be considered, whether the converse of this proposition be true; will a contract void in France, and good in England, be avoided here, because made in France? As in the case of a man, above twenty-one and under twenty-five, making a bond. Is not the law of the *domicilium* or *forum* where the plaintiff sues, to govern these cases, that are of a contradictory purview in two different kingdoms?

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ADJOURNATUR. *vide* Michaelmas, 1 Geo. 3, *post*, 256.

MICH. TERM,—1 GEO. III. 1760.—K. B.

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THE KING v. The Occupiers of ST. LUKE'S HOSPITAL.

S. C. 2 Burr. 1053.

THE occupiers of St. Luke's Hospital, Middlesex, were rated, by that name, to the poor's rate of the parish of D. On appeal, the Sessions confirmed the rate; stating specially, that in 1750 the city of London, by indenture, demised certain messuages in Moorfields to five persons, in consideration of 100*l.*, and that the same should be converted to an hospital for lunatics, under a rent of 10*l. per annum*; with covenants, that the lessees should convert the premises, or some part thereof, into such hospital, and to no other use or purpose whatsoever; and a proviso, that the lease should be void, if the same was applied to other purposes.—That twenty-nine houses had stood upon the ground so demised, which were usually rated to the

Occupiers, without naming persons, not liable to poor's rates. Hospitals, not liable for the lodging, &c. of the poor objects.

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poor.—That the premises were converted into an hospital for lunatics, according to the intention of the lease; and that every part is laid out in wards or cells, or necessary offices, or in apartments for persons attending thereon; one Joseph Mansfield being the steward and principal resident there.—That the whole is maintained by voluntary contribution, and managed by a committee of subscribers; and that no other person, but such necessary attendants, &c. have any dwelling or occupation there.—And that the lessees have not, nor can have, any interest or occupancy in the premises.

[*250] Lord MANSFIELD, C. J.—Two objections have been made to this rate. First, That the word occupiers is too general; that it says no more than the statute itself does; and does not *reduce, as a rate ought to do, the vague description of the statute to a certainty. Secondly, Suppose this could be got over, that an hospital *in such a situation* is not liable to be rated. For the Court will lay down no general rule for *all* hospitals (a); their exemptions must depend upon the special circumstances of the house.—Neither can any consequence be drawn from hospital lands (as was attempted at the bar) to the scite of the hospital itself. As to the first, we think it a fatal objection. But to prevent farther trouble in this case, we will also declare, that we think this hospital, thus circumstanced, is in no shape liable to be rated. It has been said, that the owner of lands and houses shall not so appropriate and alter them, by his own act, as to discharge them from rates. But this position is not true. Ownership confers a right of altering the nature of the property. An owner may pull down houses which are usually rated very high, and convert the situation into fields, which are rated comparatively low.—Suppose the objection to the generality of the word *occupiers* was removed; who can be the occupiers here? There are but three classes to whom that description can relate. 1. The five lessees; who have no interest, but for a special purpose; no occupation; but are such nominal persons, as the cryer of the Common Pleas is, in the form of a recovery. 2. The officers and attendants; which is the strongest ground for the rate. In the Case of *Cheslea Hospital* (b), it was determined, that the officers there, who have commodious houses and apartments, were severally rateable for their respective lodgings; which shews (by the way) that *occupiers in general* of any hospital were not thought to be liable. But here are no lodgings for officers, servants, &c. except during their actual attendance. Mansfield, the steward, was originally rated for the whole by name; but that rate was quashed by consent, as he was clearly not the occupier of all. This shews the word *occupiers* not to have ca-

(a) The objects of a charitable foundation, in the actual occupation of the almshouse and lands for their own benefit, and liable to be dismissed for any breach of the rules, are rateable; *R. v. Munday*, 1 East, 584.

(b) *Eyre v. Smallpace*, cited 2 Burr.

1059. On the same ground, the commanding officer, having extensive apartments in barracks, is rateable; *R. v. Trotter*, 3 East, 506; so the keeper of the canten; *R. v. Bradford*, 4 M. & S. 17; *R. v. Hurdie*, 3 T. R. 497, acc.

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usually slipt into the rate, but to have been inserted by design and upon good advice; because no person was liable to be rated as an individual, they were willing to try, what could be done with them in their collective capacity. In the case of the window-tax, it has been uniformly held, that the lodgings appropriated to officers (if any such) are liable. So they would be here, if any such existed. It has also as uniformly been held, that wards and cells for poor objects are not liable. 3. These are the third class; the poor mad objects. But the rating of them would be so absurd, that it was given up at the bar. Therefore, we are all (*absente Foster*) of opinion, that the rate, and the order of Sessions confirming it, must be quashed (c).

(c) *R. v. St. Bartholomew's Hospital*, 4 Burr. 2435, S. P. The master of a free school, occupying a house and garden under the trust, may be rated. *Per Grose, J.*—"In *R. v. St. Luke's Hospital*, which was one of the first cases on this subject, the ground on which the Court proceeded was, not that the house was given to charitable uses, but that there was no person that could be said to be the occupier of it. The rate there was not considered as improper, because the property was not in itself rateable, but because no occupier could be found. But in this case there is an occupier;" *R. v. Catt*, 6 T. R. 332; *R. v. Waldo*, Cald. 358, acc. Prisoners in the Fleet are not rateable for the rooms they occupy, though the warden is; *R. v. Eyles*, Cald. 407; neither are soldiers in a barrack; *per Ld. Kenyon in Eckersal v. Briggs*, 4 T. R. 6. See also *Ld. Amherst v. Ld. Somers*, 2 T. R. 372; *Holford v. Copeland*, 3 Bos. & P. 129; *R. v. Gardner*, 1 Cowp. 79; and *R. v. Hall*, 1 B. & C. 123, 2 Dow. & R. 241; *R. v. Poynder*, Id. 178, as to the meaning of the word "Householder;" 2 D. & R. 258, S. C.

Holt, C. J., said—"If one tenement be divided by a partition, and inhabited by different families, viz. the owner in one and a stranger in another, these are several

tenements, severally rateable, while they are thus severally inhabited: but if the stranger and his family go away, it becomes one tenement;" *Tracy v. Talbot*, Salk. 532. "Prisoners are like lodgers, and it never was imagined, that a person hiring a first or second floor was rateable: the landlord is rateable for the whole house;" *per Buller, J.*, in *R. v. Eyles*, Cald. 414, 2 Bott. 165. But now 59 G. 3, c. 12, s. 19, reciting, that in populous towns, payment of rates is evaded, because many houses are let out in lodgings, or separate apartments, or for short terms, or to tenants, who remove or become insolvent, &c.; and that for these reasons such houses are let higher, enacts, that the inhabitants in vestry assembled may direct, that the owner of houses, apartments, or dwellings, being the immediate lessor of the occupier, which shall be let at a rent not exceeding 20*l.*, nor less than 6*l.* per annum, for less than one year, or rent be reserved payable at a shorter period than three months, shall be assessed instead of the actual occupier. By s. 20, the goods of the occupier may be distrained; and the occupier paying rates, or having had a distress for them, may deduct the amount out of the rent.

RICHARD GOOD'S Case.

I MOVED for a *habeas corpus*, directed to the Captain of the Princess Royal man of war, to bring up Richard Good, being impressed to serve as a mariner, on an affidavit, that he was in custody, and had a landed estate in possession, of 26*l.* per annum freehold, and 20*l.* per annum copyhold. But it not being sworn, that Good was no seafaring man, the Court (*absente Foster*) desired to have that point cleared up, if possible. The next day the affidavit (being resworn) stated him to be

Query, Whether a landed estate of 46*l.* per annum will exempt a mariner from being pressed.

Good's Case.

merely a ship-carpenter, and never used to go to sea (*d*). Whereupon the writ was awarded. Upon suggesting to the Court, that the hesitation in granting it yesterday might be misconstrued, as if an objection from the property of the party pressed was not of itself sufficient, it was declared by *Dennison* and *Wilmot*, Js. (*absentibus* Lord *Mansfield* and *Foster*), that the Court had given no opinion upon that point; but chose to have the affidavit amended, in order to avoid the question (*e*).

(*d*) But a carpenter belonging to a vessel is not exempt; *Boggin's* Ca., 13 East, 549.

(*e*) But it has since been decided, that a seaman is not exempt on the ground of being a freeholder; *R. v. Douglas*, 5 East,

477: nor a liveryman or freeman of London; *R. v. Young*, 9 East, 466; nor a headborough; *For's* Ca., 5 T. R. 276. See 13 G. 2, c. 17, and *Goldswain's* Ca., post, 1207.

SELWIN v. SELWIN. (*Ante*, 222.)

Lands pass by a will, made before a recovery suffered, but after the deed to lead the uses.

THIS case was again argued by Mr. *De Grey*, for the plaintiff, and Mr. *Norton*, for the defendant.

Mr. *De Grey* cited *Toke* and *Glascock*, 1 Saund. 250, 21 Car. 2, to shew, that by the bargain and sale, the bargainee took only an estate for life, descendible to his heir, but not devisable. That in *Machil* and *Clerk*, 2 Ld. Raym. 778, which says, it was a base fee, this was neither the point in judgment, nor necessary to the point. [The] reasons then given were *Holt's* own, and not communicated to his brethren; therefore only the *dictum* of one Judge, not the resolution of the Court; Farresl. 18, Com. 119, S. C. He argued, that recoveries are held to be revocations of wills, made by tenants in fee-simple; that it would be strange, if they should establish, that those made by tenants in tail should make a void will valid, and a valid will void. That as to the doctrine of relation; judicial relations and fictions were no rule for any other. That feoffments are not perfect without livery; grants without attornment; bargain and sale without enrollment: yet nothing vests thereby, through any relation back to the first operative parts of them. That in the conveyance by lease and release, the freehold does not pass from the date of the lease, but of the release. That executory devises are not devisable by will made before the contingency happens, [see] 3 Lev. 427 (*f*): nor, in consequence, any other possibilities.

Mr. *Norton* argued, that the bargain and sale vested a reversion in fee in John Selwin, expectant on the death of his father. That it was a base defeasible fee when vested, but became afterwards indefeasible and absolute, by the completion of the recovery; which took away the entry of the issue in tail.—That the recovery vests nothing, but only substantiates the interest before vested by the bargain and sale: which differs this case

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(*f*) *Bishop v. Fountayne*, now over-ruled; see n. (m), *infra*.

from a mere covenant to suffer a recovery, which vests nothing at all.—That tenant in tail may do every act, that tenant in fee-simple conditional could do, before the statute *de donis*; except to the prejudice of his issue. He may therefore convey a defeasible fee, which is no prejudice to the issue, who by his entry may at any time defeat it. In *Stapleton and Stapleton (g)*, 2d August, 1739, in Chancery; tenant for life, remainder to his son in tail, joins with his son, *A. D.* 1724, to make a lease and release, with covenant to suffer a recovery. The son dies: and afterwards, in 1725, *the recovery is suffered. [*253] Two points arose, 1. Whether this recovery could operate on the conveyance in 1724; 2. Whether this was such an agreement, as would bind the grandson, the son of tenant in tail, in equity. Lord *Hardwicke* held the affirmative in both points: and that the estate which passed by the deed in 1724 was a base fee, as held in *Machil and Clarke*. He argued, lastly, that it was a good contingent use, and, as such, *devisable*. Because, 1st, It has been held to be *assignable*: *Wright and Wright (h)*, 15th March, 1749, in Chancery; in 1697, Thomas Wright devises to his two daughters Susan and Mary his warren, &c. in fee-simple: but if either of them died unmarried, or married without consent of his executors, she should have only an estate for life, and his son Robert should take the warren, and pay her or her executors 500*l.* They both died unmarried; but before the contingencies happened, Robert the son, in 1728, conveyed his interest in the premises to his younger son George Wright, in consideration of natural affection. And now the heir of Thomas Wright the grandfather brought a bill against George Wright for the estate. Lord *Hardwicke* determined in favour of the defendant, merely upon the point of its being a good consideration; the assignability of such a contingent interest not being disputed. 2dly, It is also *descendible*: *Gurnel and Wood (vide p. 225) (i)*; and therein Lord Chief Justice's argument was equally strong, that it was *devisable* as well as *descendible*. 3dly, In *Adams and Buxton*, Chancery, 16th July, 1754, such a contingent interest held to be in fact *devisable*. This was a devise of an estate to the testator's daughter, and if his son was minded to have it, he should pay her 250*l.* and take it. Testator died in 1724. The son had frequently offered to redeem in his lifetime; but the daughter desired he would not, till she married, which he agreed to. In 1751 the daughter died unmarried, and bequeathed all her estate to A. The son died in 1753, and devised all his estate to B. And now B. claimed to have the power of redeeming A.'s estate on payment of the 250*l.* Lord *Hardwicke* decreed, that B. should have the benefit of the clause in the original will. Objected, that this case was determined merely on the special circumstances of the son's having kept alive the right of redemption, by his frequent offers to his sister, and *the subsequent agreement between them. But the [*254]

(g) 1 Atk. 2.
(h) 1 Vcs. Sen. 409.

(i) See also *Fearn C. R. 552 et seq.*
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general rule contended for was then laid down by the Court (*quod Mansfield, C. J., concessit*).

LORD MANSFIELD, C. J.—I am sorry the established practice of the Court will not permit us to give our reasons at large, when we certify our opinion into Chancery. But I will mention one or two points, whereon the judgment of the Court will not depend. No case has ever yet happened, wherein a deed to lead the uses of a recovery has been made by tenant in tail, without a subsequent recovery suffered; nor is that the case here. Therefore we are not concerned to enquire, what kind of estate, such a deed, nakedly taken, would convey. Neither shall we enter into the fine-spun reasoning that has formerly been made use of, with regard to the doctrine of common recoveries, and the reasons why they are a bar of estates tail and remainders over. They have been differently assigned at different times, and never entirely satisfactory. The reason of this difference is, because at first the Judges were afraid to make any distinction between real and fictitious recoveries. Had they acknowledged them to be a fiction, it would not (as the humour of the times then ran) [have] been allowed to be a bar to the statute *de donis*. But since common utility has now firmly established them, and the Legislature has frequently recognized them, Judges have begun to consider them as what they really are, a fictitious proceeding, adopted as the regular mode of conveyance by tenant in tail (*k*). I can give no opinion. But there are two questions on which the certificate will turn. 1st, Whether the deed and the recovery should be taken as one conveyance, of which the deed is the most substantial part, and therefore to it every subsequent part must refer (*l*). If this should be so, there will be no other question. If not, then, 2ndly, it must be considered, whether the interest, resulting to the tenant in tail from the uses of the bargain and sale is such a possibility, as is by law devisable (*m*).

[*255] *Certificate afterwards for the defendant (*n*), *ex relatione Mri. Norton*.

(*k*) See *Martin v. Strachan*, Willes, 451.

(*l*) In *Roe v. Griffiths*, *post*, 606, his Lordship said, "that the great and manly ground upon which the Court went, in this case, was, that the deed, recovery, and all the whole transaction, was to be considered as one conveyance."

(*m*) His Lordship observed, in *Roe v. Griffiths*, that he was prepared to have shewn, with the concurrence of all his brethren, that in all contingent, springing, and executory uses, where the person who is to take is certain, so that the same may be *descendible*, they are also devisable: they are convertible terms. And in *Moor v. Hawkins*, 2 Eden, 342, cited 1 H. Bla. 33, F. C. R. 369, a similar case, Ld. Northington said, he never had a doubt, since he was 25 years old, that such contingent remainders were devisable, notwithstanding some old authorities to the contrary; that he sent the question, however, into

K. B. in the case of *Selwyn v. Selwyn*, for the satisfaction of the parties; and the certificate of the Judges, in that case, implied, he thought, that they agreed with him in opinion—and that the point was settled, and not to be shaken." This doctrine was adopted and acted upon in the case of *Roe v. Jones*, 1 H. Bla. 30; affirmed on error in K. B. 3 T. R. 88, where all the cases are referred to: it is also adopted in *Fearn v. C. R.* 368 (8th ed.), and in *Seq. Williams's* note to *Purefoy v. Rogers*, 2 Wms. Saund. 388 l. See *Perry v. Phelps*, 1 Ves. Jun. 254, and *Helps v. Hereford*, 2 B. & A. 242; and particularly *Doe v. Tomkinson*, 2 M. & S. 165.

(*n*) *Scil.* "That the several lands, tenements, and hereditaments comprised in the deed of the 20th of April, 1751, passed by the will of John Selwyn, the son."—2 Burr. 1134.

Lessee of PAUL v. PAUL.

S. C. 2 Burr. 1089.

DOCTOR George Paul, 4 October, 1752, made his will, beginning, "As to my worldly estate," &c. and then gives a legacy of 20*l.* to his son and heir for mourning; and afterwards devises to his wife, "his farm at Bovington, in the tenure and occupation of John Smith, to hold to her and her heirs for ever." And in like manner recapitulates every estate he had, and devises them, one by one, to his wife and her heirs. And then generally devises to his wife and her heirs, "all his freehold and copyhold lands *above devised*, with full power to sell, grant, give, or otherwise dispose of them, as if he himself was living." The farm at Bovington was a copyhold, under the rent of 3*l.* 6*s.* 2*d.* *per annum*, to which one Hammond was formerly admitted, who kept it in hand till 1719; when he demised the same to said John Smith, at a rack rent, "except all woods, underwoods, timber, &c. there growing, (other than the lop and top of antient pollards and the fruit of fruit-trees)," with liberty for the lessor to enter and take away the same. The woods consisted in large hedge-rows, in chalk-dales, (viz. old chalk-pits planted), and in one wood-ground, of six acres. In 1721, Dr. Paul purchased the farm of Hammond, subject to this lease, which he from time to time renewed. The heir brought ejectment for these woods, and the question, on a case reserved at the assizes, was, whether they passed by the will to Mrs. Paul, the devisee, or descended to Mr. Paul, the son and heir at law.

Lands at C., in tenure of A. B., devised by will, comprize woods and timber excepted in the lease; being words of additional description.

Mr. *Harvey*, for the plaintiff, contended, that the words, "in the tenure, &c. of John Smith," ought not to be rejected, in prejudice of an heir at law; and that the testator, by being so particular in his description, intended no more should pass than was so described, and the rest descend to his heir.

* But, *per* Lord MANSFIELD, C. J.—I wish I could form a [*256] doubt of the testator's intention, in favour of an only son disinherited. It is strange, that a man, who for fifty years together was concerned in reading and making so many wills, should make so long a one to express what he might have said in three words, That his wife should be his total devisee. He seems, in his last clause, to imagine, that no idea could be annexed to any words which he had before made use of. No argument can therefore be drawn from the supposition, that no superfluous or unnecessary words are made use of in this will (o).

The words in question are not words of restriction, but of additional description. Had he meant them as restrictive, he would have said, all that *part* of my farm, or *so much* of my farm, as is in the tenure, &c. The farm was an entire thing,

(o) See *St. John v. Bp. of Winton*, post, 930, and n. *ib.*

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it had gone together before he bought it, had been surrendered and granted all together under one quit-rent. And as to the exception, the soil and herbage in the hedge-rows and chalk-
dales was certainly not excepted (p).

DENNISON, J., *accord*. FOSTER, J., *absente*.

WILMOT, J., *accord*. He thought it clear, that the testator did not mean to die intestate as to any part of *his worldly estate* (q), from the preamble to his will. The exception in the lease was made for the benefit of the inheritance. This construction would sever this benefit from it. And what will you do with the pollards and fruit-trees? Mrs. Paul is certainly entitled to the lop and fruit; and shall the trunks descend to the son? See *Lyford's Case*, 11 Coke (r).

Verdict was entered for the defendant.

(p) See the similar case of *Down v. Down*, 7 Taunt. 343, 1 B. Mo. 80; and also *Doe v. Collins*, 2 T. R. 498; *Goodtitle v. Southern*, 1 M. & S. 399; *Doe v. Greening*, 3 M. & S. 171; *Doe v. Ozenden*, 3 Taunt. 147; *Press v. Parker*, 2 Bing. 466. In most of these cases, the question has been, whether evidence was admissible to explain the meaning of the testator; which it certainly is, where there is a latent ambiguity. "I had always understood," says Sir W. Grant, (in *Sanford v. Raihes*, 1 Mer. 658), "that, where the subject of a devise was described by re-

ference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of the devise." "When there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given, till it is shewn by extrinsic evidence what estate it was that was purchased of A., or what farm was in the occupation of B." See also *Jones v. Newman*, ante, 60.

(q) See *Frogmorton v. Wright*, post, 889.

(r) Fo. 46 b.

ROBINSON v. BLAND. (*Ante*, 234.)

[*257] THIS case coming on to be argued again, Mr. *Wedderburn*, for the plaintiff, insisted, *that excess in gaming is merely of a local nature, and of a political consideration. Moderate play in France may be excessive in Switzerland. Laws of England limit gaming as to the sum; laws of France, as to the degree of the person. By the doctrine contended for by the defendant, if an Englishman plays with foreigners abroad, and wins, he may recover; if he loses, may avoid paying, by leaving the country. If part of the statute of Q. Anne is applicable to foreign countries, the whole is so. But it will not be asserted, that the penal forfeiture of treble value extends to gaming abroad.—That the words "any law, usage," &c. refer solely, in stat. Car. 2, to the treble costs; in stat. Anne, solely to bills of exchange drawn in England. That it is a general rule of law, that all personal and mixed contracts must be governed by the law of the country wherein made. Voet. Huber. Grot. 2. 11. 5. Molinæus Consil. 53, pag. 12. Vinnius. Gaill. Barbosa, de Judiciis, 337. Duck de Author. Jur. Civil. 2. 18. 17; 4 Inst. 134, 140; 1 Rol. Abr. 530 (C), pl. 1; 532; Hob. 11; 1 Rol. Rep. 33; Hob. 212, 78; 2 Roll. Rep. 492; Show. Parl.

C. 24. *Pipon and Pipon*, Tr. 18 & 19 Geo. 2, Chancery (s), Jersey Will regulated by the *lex loci*. 2 Cro. 542; 2 Roll. Rep. 346. Objected, that this is a prohibitory law. So are the cases of foreign interest. Replied, that these are dispensed with in favour of commerce. But this could weigh nothing with Courts, who expound the law; it may, with the Legislature, to make a new one. Statutes of limitation only run, where both parties are in England. They don't affect the validity of the contract, but only the mode of recovering it. Foreign decrees are received here, not as *res judicatae*; but as evidence of the custom and law of the country. An executory contract cannot alter its nature by the change of residence in either of the parties before it is executed. *There is no distinction in France between the money lost and the money lent; one is recoverable by common law, the other in the Court of the Marshals; of the antiquity and dignity of which Court, there is an account in Force's History of France.

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Mr. Cox, for the defendant.—Courts of justice have always inclined against gaming contracts. 2 Vern. 70, defendant allowed to impari *sine fine*, in an action on a gaming debt: 1 Vern. 489, *S. C.* Gaming was prohibited by the Koran.—And in ancient Rome, as appears from Horace and Juvenal (t). By the civil law, Cod. de Aleatoribus. In France itself; Domat, Append. to Public Law; Delamare, Traité de la Police, l. 3, tit. 4, c. 4. Boullainville, History of France, says, that the cognisance of the Court of the Marshals is to take notice

(s) Amb. 25.

(t) ——— " *Vetitis legibus ales* ———"
Hor. Carm. Lib. III, Ode xxiv, 58.

" *Quem damnosa Venus, quem preceps ales nudat.*"
Id. Epist. Lib. I, Ep. xviii, 21.

——— " *Fortune veniam damus. Ales turpis, Turpe et adulterium mediocribus: hæc eadem illi Omnia cum faciant, hilares nitidique vocantur.*"
Juvenal. Sat. xi, 174.

" *Si damnosa senem juvat ales, ludit et hæres.*"
Id. Sat. xiv, 4.

" *Hic campo indulget: hunc ales decoquit: ille In Venerem est patris: sed cum lapidosa chiragra Frægit articulos, veteris ramagla fagi, Tum crasse transiæ dies, lucemque palustrem, Et ubi jam seri vitam ingenuere relictam.*"
Pers. Sat. v, 57.

" *Atque adeo, ut ne legi fraudem faciam tartæ.*"
Accusatore, ut sine talis domi agitent convitium."
Plautus in Milt. Glor. Act. II, Sc. 2.

" Nam ex Senatus-consulto vetitum est in pecuniam ludere, sponsonemve facere, ut, scilicet qui vicerit, propositam pecuniam auferat. Ad quod Senatus-consultum Justinianus constitutionem suam accommodavit. Præter hos (scilicet *αιραθες*) ludi omnes vetantur, etiamsi pecunia non apponatur, sed ejus loco lupini

ad pretium significandum, vel aurum comicum, quod et pro lupinis apud Plautum accipit Muretus et Turnebus. Invisa vero maxime legibus est *ales*, qua homines multis fraudibus exhauriuntur simul, et inter se irritantur: ut, profuso patrimonio, rapinis et cædibus rei familiaris lacunam explere conentur: ideoque aleatorum genus legibus infame habetur. Unde de Lenticula aleatore a M. Antonio restituto, tanquam de homine turpitudine notato, Cicero loquitur. Ideo *Ædilibus* mandabatur, ut illorum cœtus ab urbe ac popinis omnibus arcerent: unde illud Martialis Lib. xiv. Ep. 1.—

" *Nec timet Ædilen moto spectare fristilo.*"

Nec modo jure civili actio denegatur et retentio ei, qui ales vicerit: sed, qui victus pecuniam solverit, condictione indebiti rem solutam repetet ex constitutione Justiniani: quæ conditio non tollitur minori præscriptione, quam 50 annorum. Et qui domum suam præbuit aleatoribus, nullum a legibus adversus furta, injurias, et rapinas habet auxilium; nullam actionem, qua res ablatas vindicet, vel damnum resarciat; imo et ejus domus publicatur. Quique alium ludere compellat, multatur, aut in vincula publica, vel in latomias conjicitur.—*Gravina de Legibus*, cv.

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of the malversation of officers. The Court of Honour could never take notice of this debt, because it never became due in the life-time of Sir John Bland. He died before the date was run out. It had never been tendered in England, where it was made payable. It had not been, it could not be, protested.

LORD MANSFIELD, C. J.—This is an extremely clear case; but it may be of use to state the general principles upon which it will be determined. There are two questions:—1st. Whether the plaintiff is entitled to recover any thing, and what, upon the first count upon the bill of exchange, considered as a written security. 2dly. Whether upon either of the other counts;—upon the justice and equity of the case.

Place of making
a contract to be
considered in
expounding it,
unless the par-
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ties have a view
to another king-
dom.

As to the first; the general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits *of an exception, where the parties (at the time of making the contract) had a view to a different kingdom. Huberus says, Præl. 1, tit. 3, p. 34, contracts are to be considered according to the place wherein they are to be executed. As therefore the bill in the present case is made payable in England, it is entirely an English transaction, and to be governed by the local law (*v*). This stands upon the same ground, as that landed property must be governed by the local law; in consequence whereof, deeds and wills, made at Paris to convey land in England, must be made and interpreted according to our law. Now it is clear, that by the statute of Anne, all bills of exchange upon a gaming consideration are void (*u*); and (by the way) the fact is not found, whether, even in France, you may not enter into and contemplate the consideration of a gaming note. I rather think you may. However, it is clear, that in England, the writing, as a writing, is void.

2dly, As to the other counts, I think there is a plain dis-

(*v*) *Melan v. Duke de Fitzjames*, 1 B. & P. 138. And see 2 Fonbl. on Equity, 443, n. (f).

(*u*) So a bond given as a collateral security by a third person for money won at a game within 9 Ann. c. 14, is void; *Jefferys v. Waller*, 1 Wils. 220. And where a bond had been given for money won at play, and part of it paid, a Court of equity relieved against the bond, and ordered the money to be repaid; *Rauden v. Shadwell*, Amb. 269. But where the winner had drawn a bill on the loser for money won, payable to his own order, and had indorsed it to a third person for a valuable consideration; it was held, that such indorsee might recover upon it against the drawer. *Abbott, C. J.*, said, that the drawer could not maintain an action against the acceptor, and that no person deriving title through the drawer could be in a different situation from him, so as to sue the accep-

tor: but the drawer cannot be permitted to set up his own gaming as a defence to an action against himself; *Edwards v. Dick*, 4 B. & A. 212.

In *S. C. Burr. 1082, Dennison, J.*, is reported to have said, "This security is one entire security for money won, and money lent at play; if part of a contract arises upon a good consideration, and part of it upon a bad one, it is divisible; but it is otherwise as to the security; that being entire is bad for the whole." *Scott v. Gilmore*, 3 Taunt. 226: *Tye v. Gwynne*, 2 Camp. 346, *acc.*, in which case Lord *Ellenborough* said, he was inclined to acquiesce in the dictum of *Dennison, J.* But see *contra, Willis v. Freeman*, 12 East, 656; *Barber v. Backhouse*, Peake's N. P. C. 61, and note; Bayley on Bills, 234 (ed. 1813). As to what games are considered to be within 9 Ann. see *Clayton v. Jennings*, post, 706.

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inction between the money *won* and the money *lent*, laying the bill of exchange quite out of the case. No action can be maintained for money *won* at gaming. The statute law prohibits any recovery upon a gaming consideration, as the common law does upon all other *turpes causæ*. There are many cases, where the law of the country in which the contract is made, shall prevail; and it is hard to lay down the nice rule of distinction (*w*). There are many cases, wherein foreign sentences are final, as with regard to the validity of marriages; many, where they are only a ground of evidence *prima facie*. And here I must remark *obiter*, that it was hinted on the part of the plaintiff, that the law of Scotland must determine the validity of the marriages of minors there celebrated (*x*). Huber, p. 33, puts a parallel case, and determines expressly against it. I give no opinion; I only mention it, to hinder by-standers from taking those arguments for granted. What makes an end of this part of the case is, that, as to money *won*, the law is the same in France and in England. As for the Court of honour, it is no part of the law of the land; no Court of justice will aid it: The Parliament of Paris will take no cognizance of it. It is like the arbitrary *jurisdictions set up here at horse-races and cockpits; or (as has been observed at the bar) like the Courts martial in England, which are to decide, what is, or is not, behaving like a gentleman. If a cause really comes before them, well; if not, no Court of law will adopt their rules of decision. But here the cause could not come before them; the bill was not payable, and it was no breach of honour not to pay it before it was due. I therefore lay this Court out of the case; and more especially, as this is a suit against representatives, not the party himself.

Next, as to the money *lent*: It has been twice judicially determined, (*Slater and Emerson, coram Eyre, C. J., and Barjeau and Walmsley, H. 19 Geo. 2, coram Lee, C. J., Stra. 1249*), that the Legislature meant only to void the *security*, not the *contract*; in order to give Courts an opportunity to examine into the merits of the consideration; which, in this case, is stated to be extremely fair. Possibly it might be lent to pay foreigners' money won, and thereby to extricate the deceased from the clutches of the Court of honour.—Here also then the law of France is the same as in England; the

Qn. Whether stolen marriages in Scotland are valid.

French Court of honour not to be regarded in England.
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Gaming securities are void by the stat. 9 Ann. not gaming contracts.

(*w*) An inhabitant of Dunkirk, who sells and delivers tea there, knowing it is to be smuggled into England, but having no concern in the smuggling transaction, may maintain an action for the price in this country, on the ground of the contract being complete at D., and the plaintiff being a foreigner: for, with regard to contracts legally made abroad, the laws of the country where the cause of action arises shall govern, and no country ever takes notice of the revenue laws of another; *Holman v. Johnson*, 1 Cowp. 341. *Secus*, if the vendor had assisted in carrying the

smuggling into execution; *Waymell v. Reed*, 5 T. R. 599. See also as to where actions can be maintained in smuggling transactions, *Biggs v. Lawrence*, 3 T. R. 454, (where Lord Kenyon assents to the case of *Robinson v. Bland*), and *Clugas v. Penahuma*, 4 T. R. 466; *Guichard v. Roberts*, post, 445. As to the principle of maintaining actions here, where the cause of action arises abroad, see *Motyn v. Fabrigas*, 1 Cowp. 161; 13 Vin. Abr. 410, *Foreign*, and Supp. *ibid.*; 1 Bac. Abr. *Actions local*, (A).

(*x*) See Harg. Co. Litt. 79 b, n. [44].

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far interest shall
be computed on
a contract carry-
ing interest.

contract, when fair, is good in both countries; and the plaintiff must therefore recover under his counts for the general *assumpsits* (y).

[*261] The only question remaining is, what interest he is entitled to receive. I find the general rule has been, upon all contracts carrying interest, to stop interest, the day that the writ is sued out. This is certainly unreasonable; for the party can never have (by this rule) what he is entitled to, due interest. He can have no new action for the subsequent interest, nor any damages *pendente brevi*, as in the old actions at common law. In Chancery, the rule established by Lord Talbot, in respect of tithes, was, that they should be paid down to the last act which the Court has done to ascertain the sum. The Exchequer now pursues the same rule, having altered their old one upon my argument. *I think, in this case, the interest must be carried down to this time. It is but a trifle here; but I am glad of an opportunity to have this matter settled; and should be desirous to consult the rest of the Judges upon it, that the practice of the Courts may be uniform.

DENNISON, J.—What Lord Chief Justice has proposed as to the interest seems to be equitable; but I chuse to consider of that. As to the rest, it is a plain case, and must be ruled by the laws of England. The plaintiff has brought his action in the Courts of England, and must submit to the law of the country. The distinction between *contract* and *security* is now well established.

FOSTER, J., *absente*.

WILMOT, J.—I have no doubt as to the money *lent*. If there had been no authority in point, I should have thought that the sound ground of the act was, merely to examine the consideration, and not conclude the drawer by his own written act. In the case put at bar, of a man's lending money and winning it, and then lending more, and so on, I should think it a plain fraud on the act. (N. B. This is the very case in *Barjeau* and *Walmsley* before cited and relied upon). As to the interest, I incline to Lord Chief Justice's opinion. This is an action sounding in damages; and the damage is the detention of the plaintiff's debt. I think, upon memory, the old statutes of costs talk of the costs of the writ; which Lord Coke (x) extends to subsequent costs to the end of the suit. Same reason for extending the interest. As to the money *won*; when considered minutely, there is no case, no point, no law. The general question, whether a contract, good abroad and void at home, can be enforced here in England, is a very important one. I am clear in my opinion upon it; but it does not come into this case, because herein the law of England and France is the same. I pay no regard to the Court of honour; a whimsical, fantastical Court, which the law of England will not lend its powers to assist. Besides, Sir John never *was* the *object

(y) *Alcinbrook v. Hall*, 2 Wils. 309; See also *Vaughan v. Whitcomb*, 2 N. R. *Wellenhall v. Wood*, 1 Esp. R. 18, acc. 413.

(z) 2 Inst. 288.

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of this jurisdiction, and his representatives never *can be*. The place where the money is to be paid must guide the law. It is determined as to usurious contracts in Ireland, Pr. Chanc. 128. Clearly therefore the law of England must be the rule, as the money was made payable here. I give no positive opinion on the other point, supposing a bad contract by our law, but good abroad, is stipulated to be performed abroad. Yet I can't help thinking, that when a party applies to the Courts of England, he must conform to the English law. I see no difference, whether the contract be void by the common or statute law. Both are established by the consent of the supreme legislative power; and numbers of contracts would be void by the common law, which are good in foreign countries: For instance, in many parts abroad, a courtesan may maintain an action for the price of her prostitution (a). But, surely, that would never be maintainable here, though forbidden by no positive statute.

It was then objected, on the part of the defendant, that as the Court had declared the whole bill of exchange void, as the statute declares it to be, utterly, to all intents and purposes whatsoever, it could not be taken notice of, so as to make the 300*l.* carry interest; which, upon the mere general *assumpsit* laid in the two last counts, it would never do (b). And it was compared to indentures of apprenticeship, upon which the duty was not paid, which being declared void by the statute 8 Ann. c. 9, s. 39, no settlement can be gained in consequence of a service under them; *Curenden* and *Laland*, P. 4 Geo. 2, Stra. 903. But the Court said, that the *security only* being void, the *contract* contained in that security (which carried interest) remained in full force.

Afterwards, in the same Term, the Chief Justice declared, that it appeared from the case (independent of the bill of exchange) that the plaintiff had lent the intestate 300*l.* *bond fide*, for which he took a void security, bearing interest ten days after date. This security is void by the statute; but we *have before delivered our opinion, that the contract remains; and therefore interest is certainly due. The next question is, how far the interest should go. In the present case, this is a very minute consideration: but I am glad of an opportunity of settling a point, the practice in respect to which is not founded in law, but upon a mistake. In justice, undoubtedly, interest

A contract may continue to carry interest though the security itself is void.

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Interest shall be computed to the time of the judgment.

(a) 4 T. R. 190, *Hunter v. Potts*.

(b) In an action for money had and received, &c. the plaintiff cannot recover for interest: Lord *Ellenborough* said, it ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved, that the money has been used,

and interest has been actually made; *De Havilland v. Bowerbank*, 1 Camp. 50, and see Mr. Campbell's note to that case; confirmed in *De Bernales v. Fuller*, 2 Camp. 426, and notes. So though, upon a contract for the sale of goods, a certain day of payment be given, interest does not run from that day; *Gordon v. Swan*, 12 East, 419, 2 Camp. 429, n. S. C. See also *Slack v. Lovell*, 3 Taunt. 157; *Hamilton v. Houghton*, 2 Bligh, 169; *Higgins v. Sargent*, 2 B. & C. 348, 3 D. & R. 613.

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is due to the time when the debt is paid: for, when a man contracts to pay principal and interest, he ought to pay interest so long as he retains the principal. The Court should therefore order the payment of interest, up to the time when it orders execution to be taken out. It is said, that damages are recovered and assessed by the jury, which will extend to this case. But we all know, that in actions upon contracts for the payment of *money*, the damages are nominal; the true relief consists in the specific performance. When money is given as damages, it is where the money is not itself the specific demand, but is used as a common measure, to ascertain the amount of the injury. I have looked into and fully considered all the statutes upon the subject of damages (c). Not one has any reference to this matter. On the principles of common law, whenever a duty incurred (pending the writ) for which no other satisfaction could be had, damages were given to the time of the judgment. Thus, in account, the judgment is *quod computet*; which includes all items of account up to the time of computation. On a writ of annuity, after judgment, no new writ can be had for arrears. Judgment is therefore given for the whole that becomes due, pending the writ. Upon the statute of Gloucester, which gives damages in a real action, Lord Coke, 2 Inst. 288, holds, that they shall extend to damages, *pendente brevi*. But whenever a new writ could be brought, damages were not computed, *pendente brevi*; as in covenant, actions of trespass, or for other *torts*. Upon the same reason, if a man brings an action on a contract carrying interest, and the action hangs three or four years, no new action *will lie for the mere interest; and therefore he ought to be allowed it now. The Court of Chancery has, in these matters of interest, a *concurrent* jurisdiction with Courts of law, exclusive of its *extraordinary* jurisdiction by way of relief. This arises from the frequent contemplation of interest in respect of assets, and the consideration of assets always gives the Court of Chancery a jurisdiction. It would be absurd, that two concurrent jurisdictions should be different in their principles; on which ground it is, that Courts of equity have usually conformed to the practice of the Ecclesiastical Courts, in respect of legacies. Now in Chancery, they always compute down to the time of the last act done by the Court, to liquidate the demand. And I don't see, why the jury should not in their discretion (according to the circumstances of the case) compute down to the verdict; or rather, to the first four days of the ensuing Term (d). The mistake before hinted at, in the present course of practice, arises from the officer's looking upon an action of *assumpsit* as merely an action of *trespass*: and as

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(c) 5 Supp. to Vin. Abr. 135, *Intire Damages*.

(d) This rule for the computation of interest was recognized by Ld. Mansfield in *Cumming v. Hanforth*, where he said, that on debts carrying interest, the jury are now directed to give interest in damages

up to the day on which final judgment may be signed: cited by *Buller, J.*, in *Frith v. Leroux*, 3 T. R. 57. And see 7 Vin. Abr. 267, *Damages* (H 3), & Supp.: 2 Bac. Abr. 268, *Damages* (D) 3; and *post*, 267.

in common actions of trespass, damages are only recovered to the day of suing out the writ, therefore they computed in the same manner here. Where an error is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the Judges, till the Legislature thinks proper to alter it: lest the new determination should have a retrospect, and shake many questions already settled: but the reforming erroneous points of practice can have no such bad consequences; and therefore they may be altered at pleasure, when found to be absurd or inconvenient. Therefore, without computing to an exact nicety, let there be judgment for the plaintiff, for 300*l.* principal, and 75*l.* interest (*viz.* five years at five *per cent.*, down to 10th September, 1760).

DENNISON and WILMOT, Js., *accord.* FOSTER, J., *absent.*

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When precedents, though erroneous, should be adhered to, and when not.

[DOE] Lessee of LONG, v. LAMY [OF LAMING].

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S. C. 2 Burr. 1100.

IN ejectment, the case, stated for the opinion of the Court, was this:—Martin Long, seised in fee of lands in gavelkind, devised three-fourth parts of them to A., B., and C., with special limitations; and the remaining fourth part, “to Ann the wife of Thomas Cornish, and to the heirs of her body lawfully begotten and to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally between them as tenants in common, and not as joint-tenants.” Ann Cornish, at the making of the will, had two daughters, and afterwards died in the lifetime of the testator; upon whose death the daughters entered, and the heir of the testator brought this ejectment.

A devise to one and her heirs may, in particular circumstances, make the heirs take by purchase.

Mr. *Filmer*, for the plaintiff, argued—1. That this was a devise to Ann Cornish in tail general, and that, by her death in the life of the testator, it became a lapsed devise; whereby the heir was entitled to the whole. And, in a very ingenious argument, relied on *Goodright* and *Pullyn*, *Ld. Raym.* 1437; *Andrews* and *Leguy*, 1730, an appeal from Barbadoes (*e*); *Wright* and *Pearson*, *Tr.* 31 Geo. 2, Chancery (*f*); *King* and *Burchill*, Chancery (*g*), since determined. 2. That if the mother and daughters had a fee-simple devised to them, as tenants in common; then, as to one-third at least, it was a lapsed devise, by the death of the mother.

Mr. *Clarke*, for the defendants, insisted, that it appeared, from the complexion of the will, that an estate for life only was intended to be devised to the mother, and a remainder in fee-simple to her children; the word *heirs* being here a word of purchase, and not of limitation. And of this opinion was the Court, *vis.*

Lord MANSFIELD, C. J.—The principal question is, Whether

(*e*) Cited 2 Burr. 1102, 2 Atk. 249.

1 Eden, 119.

(*f*) *Fearne* C. R. 126, *Ambli.* 358,

(*g*) *Ambli.* 379, 4 T. R. 296, n. (*d*).

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the word *heirs* is so invariably a word of limitation, that no explanatory words of the testator can make it a word of purchase. The general rules are—1. Where the *word *heirs* is grafted on a gift to the ancestor, it denotes the *quantum* of the estate granted, and is *primâ facie* a word of limitation. 2. Where the ancestor takes an estate for life, the heir cannot be made a purchaser by the same conveyance, but must take by limitation (*h*). The original reason of this rule was a feodal one; lest the lord should be defrauded of his fruits and profits arising from heirship, by contriving to make the heir a purchaser, as well as the ancestor. And, having upon this ground become a rule of property, it must now continue so, though the reason has ceased (*i*). Yet it has been held (*Newcoman* and *Bethlem Hospital* (*k*), *coram Cowper* and *Hardwicke*, Chancellors), that a man may take by description as heir-male and be a purchaser, though he does not fall within the exact description of being both heir and male, the next heir being a female; and therefore not taking by inheritance, but merely under the description, to satisfy the intent of the testator, he shall take as a purchaser. However, therefore, these general rules are established, yet in particular cases, where special circumstances interfere, they have been frequently dispensed with. As in *Backhouse* and *Wells* (*l*); *Robinson* and *Robinson* (*m*); *Lisle* and *Gray* (*n*); *Allgood* and *Withers* (*o*); *Papillon* and *Boys* (*p*). And the present case is much the strongest I ever knew, to shew, that *heirs* were intended to be words of purchase, and not of limitation. 1. These are lands in gavelkind, in which the plural word *heirs* is equivalent to the singular *heir* in common cases; which has been frequently held to be a word of purchase. 2. He gives the land to his heirs *female, as well as male*. Now it cannot by law *descend to both* (*q*), but they both may take as purchasers. 3. It is *equally to be divided between them*, which must refer to heirs of Ann Cornish, as the persons to take by force of the immediate devise. 4. They are made *tenants in common*; which shews that they are not to take by descent, for then they must be *parceners*. The word *heirs* therefore is here merely descriptive of the persons to take after the death of Ann Cornish; and they must all take as tenants in fee-simple.

(A) *Fearne* C. R. c. l. s. v. p. 28, and p. 79.—This is the rule in *Shelley's Case*, 1 Rep. 93: see *Hayes* v. *Foord*, *post*, 698. S. P. per Ld. *Mansfield* in *Evans* v. *Astley*, *post*, 521.

(i) S. P. *post*, 521.

(k) *Ambl.* 8, in which Ld. *Hardwicke*, C., affirmed the decree of Ld. *Cowper*, C., in *Brown* or *Newcoman* v. *Barkham*, 2 Vern. 729, Prec. Ch. 442, 461, 1 Stra. 35; S. P. *Wills* v. *Palmer*, *post*, 687, which see, and note, *ibid*.

(l) 1 Eq. Abr. 184, *Fearne* C. R. 152, cited 2 Stra. 731, 2 Lord Raym. 1440.

(m) 3 Atk. 736, 2 Ves. S. 225, in Canc.; S. C. 1 Burr. 38, in B. R.; S. C. 3 Bro. P. C. 180, in D. P.: but in that case it

was decided, that a devise to L. for life and no longer, and after his decease to his son, and for default of such issue to W., gave L. an estate tail. There is also a full report of the case in 1 Ld. Ken. 298.

(n) 2 Lev. 223, T. Raym. 278, 302, 315, T. Jon. 114, 2 Show. 7; and affirmed on error as appears from S. C. *Pollenfen*, 582, 1 P. Wms. 90, F. C. R. 151.

(o) Cited 1 Ves. S. 150, F. C. R. 120.

(p) 2 P. Wms. 471, and Mr. Cox's note, Id. 478.

(q) Litt. s. 210, 2 Rla. Comm. 84; *Doe* v. Bp. of *Landaff*, 2 N. R. 506; *Doe* v. *Harvey*, 4 B. & C. 620, 7 D. & R. 78; *Bac. Abr. Gavelkind* (A).—See more as to gavelkind in *Davenport* v. *Tyrrrell*, *post*, 675.

*DENNISON, J., *accord*.—This is the plainest case I ever saw in my life.

FOSTER, J., *absente*.

WILMOT, J., *accord*.—The principle that must govern our interpretation is the intent of the testator. This will be best determined, without looking into a multitude of cases. I am of opinion, that, 1. The testator intended his niece's children should all take in fee-simple, as tenants in common. 2. This is a legal intention, and therefore to be carried into effect. 3. This intention cannot be carried into execution by making the niece tenant in tail: See Palm. 359. 4. As the estate is not to be divided till the death of the niece, she cannot be let in to an equal share, as tenant in common, with the children.

Verdict entered up for the defendant (r).

(r) This case is recognised in *Goodtitle v. Herring*, 1 East, 264, 273; *Doe v. Smith*, 7 T. R. 531, 533; *Doe v. Goff*, 11 East, 668; and see *Jeffery v. Honeywood*, 4 Madd. 398, Fearn, C. R. 148, *et seq.* (8th ed.) where all the cases are collected, and *Goodright v. White*, post, 1010. But in a late case *Doe dem. Bosnall v. Harvey*, 4 B. & C. 610, where there was a devise of gavelkind lands to T. C. for life; remainder to trustees to preserve, &c. and "from and after the decease of T. C., then to and amongst all and every the heirs of the body of the said T. C., as well female as male, lawfully to be begotten, such heirs, as well female as male, to

take as tenants in common, and not as joint tenants, and for default of such issue," remainder over: it was held, that T. C. took an estate tail. *Bayley, J.*—"Doe v. *Leming*, is distinguishable from the present case, because there words of limitation in fee were grafted on the words *heirs of the body*, and they could not have been satisfied by an estate tail in the ancestor." *Littledale, J.*—"The principles applicable to this subject must be considered as finally settled by the decision of the House of Lords in *Jesson v. Wright*, 2 Bligh, 2:" which see, where all the cases are referred to, and which overrules the case of *Doe v. Goff*, 11 East, 668.

BODLEY v. BELLAMY.

S. C. 2 Burr. 1094.

ACTION of debt on a bond of 1000*l.* conditioned to pay 500*l.* with Indian interest, and also on a count for a *mutuatus* for 500*l.*(s). In Michaelmas Term, 1756, the cause was tried

Indian interest, when made principal here, bears English interest.

(s) It appears by comparing this report with that in 2 Burr. 1094, that the defendant, being indebted to the plaintiff in 515*l.* or thereabouts, had given him a bond at Calcutta in the penal sum of 1031*l.*, and that the legal interest there is 9*l.* per cent.: that they then both resided there, and the plaintiff continued to do so. The plaintiff declared in debt for 1546*l.*, viz. one count on the bond for the penalty 1031*l.*, and another on a *mutuatus* for 515*l.* The cause was tried in M. T. 1756, (in Burr. it is said 1759, which must be a mistake); and no evidence was given on the count for the *mutuatus*; in fact the plaintiff had not lent the defendant any other money but that for which the bond was given: however, a verdict was given generally on both counts, and judgment entered accordingly. After several delays in equity, the defendant brought a writ of

error upon that judgment in the Exchequer Chamber, where it was affirmed, and then he obtained a rule to shew cause, "why, upon payment of the whole penalty, the costs in K. B., and the costs of the writ of error, execution should not be stayed, and satisfaction entered on the record." As it is the province of the Court of Exchequer Chamber to award interest (at its discretion) from the time of signing judgment below to the time of affirmance; *Welford v. Davidson*, 4 Burr. 2127; *Shepherd v. Mackreth*, 2 H. Bla. 284; the Court of K. B. had no power to give interest between the time of signing judgment and affirmance; but as the plaintiff had an equitable right to it, and the defendant had not applied in time to rectify the mistake, by which the plaintiff had recovered more than he was legally entitled to, but had used vexatious delays,

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in London, and a general verdict for the plaintiff. But by means of the defendant's delays, by injunction bills, &c. the final judgment was not entered till this Term, which was for the whole 1500*l.*; the interest due having now exceeded the penalty of the bond. *Morton* moved to stay execution, upon payment of the whole penalty and costs, because no evidence had been given on the *mutuatus*. But *Norton* for the plaintiff contended, that having got an advantage at law, which the defendant might have excepted to in time, he shall not now be stripped of that advantage by the interposition of the Court; but that execution shall be taken out for the whole sum *bond fide due*.

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Lord MANSFIELD, C. J.—When a judgment is once obtained on a contract carrying foreign interest, the subsequent *interest must follow the rule of this country. In like manner, as on old mortgages bearing six *per cent.* interest: Though Lord *Talbot* determined, that the interest, when accumulated and made principal, should follow the nature of the original debt; yet Lord *Hardwicke* afterwards settled it, that it should only bear modern interest at five *per cent.* I find different rules established in our different Courts, with respect to this matter of interest on sums thus accumulated and liquidated. The question principally occurs in our Courts of appeal and error. In Parliament, they always consider interest in the *quantum* of costs, which is always some specific arbitrary sum. In writs of error to the Exchequer Chamber (*z*) from the Court of Exchequer, they always compute interest to the day of affirming the decree. In writs of error from hence to the Exchequer Chamber (*v*), or in this Court from the Common Pleas, the practice has been, not to compute interest, unless in some special cases, such as *Stra.* 925. I think the practice unreasonable. Therefore, in this case, let Indian interest run to the day of the judgment, and from thenceforth only five *per cent.* on the accumulated sum of principal, interest, and costs, to the day of execution; and let execution be taken out to the amount of the whole (*u*). The nature of the contract furnishes this remedy; since an action might be brought upon the judg-

the Court allowed the former to avail himself of that mistake to have execution for the principal and interest, *4. s.* Indian interest to the time of judgment in K. B., and interest at 5*l. per cent.*, to the time of taking out execution, upon the accumulated sum.

(*t*) Before the Lord Chancellor, Lord Treasurer, and Judges of K. B. and C. P.; 2 *Bac. Abr.* 481, *Error*, (1) 3.

(*v*) The Court of Exchequer Chamber is bound to allow double costs; but it is discretionary whether interest shall be allowed or not: if it is, it is referred to the clerk of the errors to compute it; *Shepherd v. Mackreth*, 2 H. Bl. 284. So interest is allowed there on a judgment of *non pros.*; *Sykes v. Harrison*, 1 Bos. & P.

29; and always at the rate of 5*l. per cent.* *ibid.*

(*u*) This rule for allowing interest was afterwards recognised by Lord Mansfield in *Zinck v. Langton*, 2 *Doug.* 752, n. (3), where it was decided, that a Court of error may give interest as damages on the sum recovered by the original judgment, on the affirmance thereof. And if by the course of such Court interest is not computed in the allowance of costs, the jury, in an action on the judgment, may give it in the name of damages: *Per Buller, J.*, in *Entwistle v. Shepherd*, 2 T. B. 79. See also *Frith v. Leroux*, *Id.* 57; *Saxelby v. Moor*, 3 *Taunt.* 51, and *Tidd's Pr.* 1230, *et seq.* (ed. 1821).

ment (*w*), without having recourse to the *mutuatus*; for I should not care to have the justice of this Court depend upon a blunder in entering the verdict.

DENNISON and WILMOT, Js. (*FOSTER absente*), *accord*.

N. B.—Mr. *Morton* sent privately to the clerk of the rules, that he would take nothing by his motion. So no rule, I apprehend, was drawn up.

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(*w*) In which case interest would be recoverable beyond the penalty; for, as *Ld. Kenyon* observed, after judgment recovered *transit in rem judicatum*; *M'Clare v. Dunkin*, 1 East, 436. The rule now established seems to be, that in a proceeding upon the bond itself, no interest is allowed beyond the penalty, except under special circumstances; *Clarke v. Seton*, 6 Ves. J. 411, where all the cases on this point are considered. There *Sir W. Grant*, *M. R.* observed,—“ I do not say there are not cases in which interest may be allowed

upon a judgment, though a judgment upon the bond and beyond the penalty. Such cases have occurred; where there has been great delay by writs of error, &c. as in *Bodley v. Bellamy*. But it is not of course in every case.” *Ex parte Rushforth*, 10 Ves. Jun. 409; *Hefford v. Alger*, 1 Taunt. 218; *Shutt v. Procter*, 2 Marsh. 226. See also the observations of *Sir W. Grant* in *Clarke v. Lord Abingdon*, 17 Ves. Jun. 106, and *Atkinson v. Atkinson*, 1 Ball & Bea. 238.

THE KING v. DE TESSIER.

THE defendant was a young merchant of London, who was convicted on an information for contriving and effecting the escape of several French prisoners of war (*x*). It was *pressed by the commissioners of that department, to make him a public example; but he represented to the Court, that any corporal punishment or imprisonment might prejudice him in his way of life, that he was sorry for his offence, and ready to pay any pecuniary fine that the Court should award. The Court fined him 50*l.*, *absente Foster, J.*

Judgment for aiding the escape of French prisoners.
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(*x*) Persons aiding prisoners of war to escape are now liable to seven or fourteen years transportation, by 52 G. 3, c. 156.

THE KING v. DR. SMOLLET.

S. C. 3 Burr. 1313, but not *S. P.*

THE defendant was a nominal physician, in the booksellers' pay; and was convicted on an information, for writing a libel against Admiral Knowles, in the Critical Review. He declared his sorrow for his offence, that he had offered the Admiral reasonable satisfaction, which was refused; and was now ready to do as the Court should think proper. The Court (*absente Foster, J.*) fined him 100*l.* imprisoned him for three months, and ordered him to find security for the good behaviour for seven years, himself in 500*l.* and two sureties in 250*l.* each. And Lord *Mansfield, C. J.*, added, that his submission had had its effect with the Court.

Judgment for a private libel.

THE KING v. Captain FALKINGHAM.

Fine for disobeying an *habeas corpus*.

THE defendant was Captain of a man of war, and was brought up on an attachment, for not only disobeying an *habeas corpus* for delivering an impressed sailor, but also impressing four of the boat's crew, which brought the writ. He had agreed with the injured parties for their private satisfaction; and the Court (*absente Foster, J.*) were pleased to consider the public offence as a mere inadvertence; otherwise, they said, a fine of 2000*l.* had been formerly set on such an occasion; and dismissed the Captain, on payment of a fine of 10*l.* (y).

(y) See *Good's Ca., ante*, 251.

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HILARY TERM,—1 GEO. III. 1761.—K. B.

YATES v. CARLISLE *et al'*.

Court will censure an unnecessary length of pleading.

REFERENCE to the Master, to report, by whose fault the pleadings were extended to so enormous a length. He reported this to be an action of trespass, battery, and false imprisonment, against eight defendants, commenced A. D. 1751: That in the declaration there were three counts for the trespass, and two for false imprisonment: That there were twenty-seven several pleas of justification by these several defendants; which, with replications, traverses, novel assignments, and other engines of pleading, amounted at length to a paper book of near two thousand sheets, which was brought into Court. He was of opinion, that the fault lay principally in the length and intricacy of the declaration; the action being only brought to try, whether the freeholders and copyholders of the manor of Ellerton in Yorkshire (whereof Luke Robinson, Esq., a barrister, was lord, in right of his wife) were entitled to common in a ground called the inclosure. That the declaration was so catching, by running changes upon the several defendants, and the several names of this ground, that it was necessary for the defendants to guard every loophole, which made their pleas so various and so long. That Robinson had declared, he had drawn the declaration in this manner on purpose to catch the defendants, and that he would scourge them with a rod of iron. That in another cause for the same question, brought against the same defendants (in Robinson's own name), the art was so far improved, that the paper book would amount to three thousand sheets.

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* *Robinson, in propria personâ*, shewed cause against this report, no other counsel caring to be employed; and insisted, he had a right to do what he had done, and that he thought the whole declaration necessary. The Court strongly inclined

to fix some heavy censure upon him(a), but desired that, previously, the question of right might be tried: and it was recommended by the Court to Serjeant *Hewit*, *ex parte Robinson*, and Mr. *Winn*, for the defendants, to settle an issue for that purpose; which they did the next day, in a quarter of a sheet of paper; and it went down to be tried on the northern circuit. *Vid.* Trinity Term, 1761, *post*, 291.

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(a) As to the length of modern pleadings, see *Hale's Hist. C. L.* by Runnington, 211, 212, n. (a), ed. 1820.

MAXWELL v. MAYRE.

S. C. 2 Burr. 1026, not S. P.; *S. C.* 3 Burr. 1314.

TRESPASS by a Scots pedlar(b). The question was, whether, under the articles of Union, he was exempted from the Hawker's Act, 5 Anne, c. 19; so as to trade by *wholesale* with Scotch linen manufactures in England.

Qn. Whether a Scots pedlar can vend Scots manufactures by wholesale in England without licence?

Aston, for the plaintiff.—In the statute 3 & 4 Anne, c. 4, there is a clause, sect. 14, which privileges all persons trading by *wholesale* in the linen and woollen manufactures of *this* kingdom. Then comes the statute of Union(c), which unites the two kingdoms. Now, therefore, Scots manufactures are the manufactures of *this* kingdom. England as a kingdom is no more. The 4th, 6th, and 18th articles of the Union communicate the same rights, as to trade, throughout the whole united kingdom. The 25th article vacates all laws inconsistent with the Union. The place of the vendor's nativity is immaterial. We insist, that a native of Reading may sell Scots manufactures by wholesale. Cases happening under subsequent statutes, which fall within the reason of antecedent ones, are subject to the penalties or privileges of those antecedent statutes. *Plowd.* 127, *Case of Statute of Acton Burnel* and *Statute de Mercatoribus*;—of *Statute of Wills* and *Statute of Jointures*, 12 Mod. 485, *486, [*272] *Lord Holt's* argument; *Buckley* and *Thomas*, *Plowd.* 120, Welch sheriffs subject to the penalties of 23 Hen. 6, for a false return; though united to England so late as 27 Hen. 8. In that case, the defendant was subjected to a penalty; in this, the plaintiff claims an exemption from a penal law. 5 Co. 49 b, *Vaughan's Case*, Resolution 2, All the statutes of Jeofails extend to Wales, because made parcel of England. Stat.

(b) The plaintiff was a native of Scotland, carrying linen goods, of the manufacture of Scotland, from town to town in England, and exposing them to sale in a room in each town by *wholesale* only. The defendant, a justice of peace, convicted him for not producing a license, and issued his warrant to distrain, on which the present action was brought. *S. C.* 3 Burr. 1314. See also *R. v. Little*,

1 Burr. 609. A licensed auctioneer, selling goods on commission at different towns by *retail*, or by auction, must take out a hawker's and pedlar's license; *R. v. Turner*, 4 B. & A. 510; *Dean*, q. t. v. *King*, Id. 517, S. P. And see *Allen v. Sparkhall*, 1 B. & A. 100.

(c) 5 Anne, c. 8. See Serj. Runnington's note (c), *Hale's Hist. C. L.* 286 (ed. 1820); 1 Bl. Comm. 95.

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20 Geo. 2, c. 42(d), (the Glass Act), declared, that wherever England is mentioned in any act of Parliament, it did always extend to Wales. See also statute 7 Anne, c. 21, Preamble. Saxby's Book of Customs says, the word "England" must be changed into Britain, in all clauses touching the revenue, by virtue of the Union. Burn's Justice, Introd. 21, pl. 23, same point. These shew general usage and received opinion.—*Infra hoc regnum*, since the Union, always taken to include Scotland; therefore in indictments for trading contrary to the 5 Eliz. (e), the words *Infra hoc regnum* have been held bad, since the Union(f). *Obj.* That by statute 4 Geo. 1, c. 6, vendors of English bone lace, by wholesale, are declared not to be within the Hawkers' Act; and thence argued, that vendors of Scots bone lace are not included. *Answ.* This is only a description of the species of manufacture (as China ware, Delft ware, Dutch tea-kettles, &c.) originally invented in England, but now carried on elsewhere.

Norton, for the defendants.—General rules of construction are these:—1. Where many laws relate to the same thing, the best way is to consider them as one law. 2d. You can't take a part of a law, and reject the rest. 3d. Exemptions from a law can only be co-extensive with the law itself. Thus, where provisos are made by way of exception, the exceptions can only extend to those, who would otherwise be the objects of the general enacting part. Let us attend to the history of this law. * It began in 7 W. 3.—8 & 9 W. 3, c. 25, gave the first duty on hawkers and pedlars; 9 & 10 W. 3, c. 27(g), is now the standing law. In 12 W. 3, duty continued to 1706: and to 1710, by the 3 & 4 Anne, c. 4, which recites doubts concerning the linen and woollen manufactures of *this* kingdom, and exempts them from taking a license. In 5 Anne, c. 8, the Act of Union: before which the manufactures of Scotland were certainly liable to penalties. Regulations of particular modes and branches of private trade are local, and confined to this kingdom of England. The Hawkers' Act not once noticed in the Act of Union: but in art. 18, this difference is expressly taken between a general and private right: and particular provisions are made for the importation of cattle, and the manufacture of coarse cloth. 5 Anne, c. 19 (subsequent to the Union) continues the duties on hawkers for ninety-six years from 1710.—1 Geo. 1, c. 12, makes the duty perpetual. Neither of them extend it to Scotland. Would the Scots have the benefit of the exemption, and not bear the burden? Here the three propositions before laid down will apply. The construction contended for would demolish half of the revenue. The 4 Geo. 1, c. 6, concerning English bone lace, is a legislative exposition of the Act of Union, so far as relates to this

(d) Sect. 3.

(e) C. 4. See *R. v. Pemberton*, ante, 230.

(f) *R. v. Briton*, 2 Barnard. K. B.

147, 172. See 20 Vin. Abr. 335, *Trade*, (K), pl. 18.

(g) Repealed by 50 G. 3, c. 41, which contains the regulations now in force.

point, and shews, that a distinction may still be made between English and Scots manufactures.

This being a very general question, *Curia advisare vult*.

See P. 2 Geo. 3, *post*, 364.

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THE KING v. WHEATLEY.

S. C. 2 Burr. 1125.

DEFENDANT was indicted, for that he, being a common brewer, and intending to deceive and defraud one Richard Webb, delivered to him sixteen gallons, and no more, of amber beer, for and as eighteen gallons, which wanted two gallons of the *due measure* contracted to be delivered; and received 15s. for the same; to the evil example, &c. and against the peace, &c. After conviction before Lord Mansfield, C. J., at Guildhall;

Delivering less beer than contracted for as the due quantity, not indictable.

**Morton* moved in arrest of judgment, that this was not an indictable offence, being merely a breach of civil contract, and not a selling by false measure: and cited *K. and Gombroon*, H. 24 Geo. 2(h); a case in point: the indictment there was quashed. *K. and Driffield*, H. 27 Geo. 2(i); indictment for fraudulently selling a quantity of coals, as two bushels according to the standard in the Exchequer.—Quashed. *K. and Harman Heath*; indictment for selling seventeen gallons and an half of Geneva, as and for nineteen gallons.—Quashed, being only a breach of civil contract. Perhaps it will be said, none of these indictments were supported or argued; but that [is] no legal objection, [for] the Court won't quash, unless upon the face of them [they are] quashable. The conclusion rather is, that they were looked upon as not defensible. The Court is the more strict upon indictments, because this mode of prosecution (when adopted instead of a civil action) admits the party complaining himself to be a witness. In all Tremaine's Precedents, title *Cheat*, not one indictment for this offence, unless where coupled with a conspiracy or false token.

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Yates on the same side.—Wrong, alone, will not warrant an indictment; it must be accompanied with a deceit, and such a one, as shews a general plan of imposing upon the public. Here is no charge for using false measures, but only for not delivering the quantity agreed on. The defendant has delivered fewer gallons; *non constat*, that he used a false gallon measure. In the most common way of cheating now practised, that of jockeyship, an action always lies, not an indictment.

Norton, in support of the indictment, argued, that after a verdict the Court will do what it can, to support an indictment. All offences of a public nature are indictable. This is done in a course of trade. The defendant [is] stated to be a common brewer: no rule, that because an action may be

(A) Or *Combrune*, 1 Wils. 301.

(i) Say. 146.

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Quashing an indictment much stronger than arresting judgment.

brought, therefore an indictment cannot. None of the cases cited were after verdict. After verdict, I may suppose any fact consistent with the indictment. I will therefore suppose the fraud to have been committed by using a false and deceitful cask, which, in truth, was the real case. *The words, *as and for eighteen gallons*, are large enough to found a charge of false measure. In all the cases cited for the defendant, the point was never mooted in one of them. (Note, *Wilmot, J.*, said, that the *King* and *Gombroon* was litigated, according to his note of it, and many cases cited.)

LORD MANSFIELD, C. J.—I wish this indictment could be supported, because the offence is a common practice; and in this case, I remember it appeared to have been done knowingly. In all criminal proceedings, I think the settled forms of law should be strictly adhered to; in this case, the law is already settled, and I think upon very wise foundations. If any distinction is made between quashing, and arresting judgment, that of quashing is the strongest way; because the indictment must be very grossly bad, to have the Court quash it at once. No latitude of construction, no intendment of law, can go to any thing, but what is contained in the indictment. The whole must be supposed true, as it stands; for a motion in arrest of judgment is in the nature of a demurrer.

I think this case not indictable; it only amounting to unfair dealing with, and an imposition on, a *private* man; whose own carelessness it was not to measure the cask. All indictable cheats are where the *public* in general may be injured; as by using false weights, measures, or tokens;—or where there is a conspiracy. None of these are laid in this indictment. Many stronger cases than this (that of jockeyship (*k*) in particular) are not indictable. M. 6 Geo. 1, *K. and Wilzer*; the defendant, a common brewer, was indicted for selling ale in casks marked as containing so many gallons, when in fact they contained only so many. The Court unanimously quashed the indictment.

DENNISON, J.—Of the same opinion. What is it to the public whether Richard Webb has, or has not, his eighteen gallons of amber? The Court will lean against such indictments, because (as rightly observed) they alter the course of the law, by making the prosecutor a witness. In *Qu.* and *Macartney*, indictment quashed, because no false tokens (*l*). In *Qu.* and

(k) "The selling an unsound horse as and for a sound one is not indictable: the buyer should be more upon his guard;" *Per Lord Mansfield, S. C. 2 Burr. 1128.* An indictment will not lie for a deceitful warranty and representation of the soundness of a horse, without evidence of *concert* between the parties to effectuate a fraud; *R. v. Pywell, 1 Stark. R. 402.*

(l) *Reg. v. Macarty & Fordenborough, 2 Ld. Raym. 1179, 6 Mod. 301, Ca. temp. Holt, 300.* They were indicted for bartering Portugal wine for hats, affirming

that it was good wine, whereas, in fact, it was not drinkable or wholesome: but it appears from *Ld. Raym. 1184*, that judgment was given for the Crown. Lord *Ellenborough*, speaking of that case, said; "Was not that a case of conspiracy? At any rate the cheat was effected by means of bartering pretended port wine, which the indictment alleged was not wholesome or fit to drink: and the vending of such an article for drinking is clearly indictable:" in *R. v. Southernon, 6 East, 133*: and see the observations in *2 East, P. C. 834.*

**Jones*, Lord Raym. 1013(m), quashed for the same reason: *Holt* said, shall we indict one man for making another a fool?

FOSTER, J.—Same opinion. *K. and Wilder* is a very strong case:—too strong a case. For there were false tokens, which do not appear in the present(n).

WILMOT, J.—Imposition, against which common prudence may guard a man, is not indictable; but where it is accompanied by so cunning and artful a contrivance that a wise man may be easily deceived, it is otherwise. *K. and Pinkney*, P. 6 Geo. 2(o); indictment for selling a sack of corn, which he falsely affirmed to contain a Winchester bushel, quashed. The Court said, if a shopkeeper warrants a piece of cloth to contain six yards, and it does not, it is not indictable; because the buyer should see it measured. Of the same opinion.

Judgment arrested *per tot. Cur'* (p).

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(m) Salk. 379, *S. C. Jones* came to A. and received £20, falsely pretending that B. had sent him. See *R. v. Murray*, 2 Stra. 1127; *Bryan's Ca.*, 2 Stra. 866.

(n) "Possibly the Court, in deciding the case, thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did in effect resolve themselves into no more than the dealer's own affirmation, that the vessels contained the quantity for which they were marked;" 2 East, P. C. 820.

(o) 2 East, P. C. 820; where the Court also said, "if a person selling corn should measure it in a bushel short of the statute measure, or should measure it in a fair bushel, but put something into the bushel to help to fill it up, he might be indicted for the cheat."

(p) This Case of *R. v. Wheatley*, is considered a leading one on the subject of cheats and frauds at common law: "for it seems to have clearly established the true boundary between those frauds that are, and those that are not indictable at common law:" *Per Lord Kenyon*, 6 T. R. 569. "The true definition of cheats and frauds punishable at common law is: The fraudulent obtaining the property of another, by any deceitful and illegal practice or token (short of felony) which affects, or may affect the PUBLIC;" 2 East, P. C. 818; adopted in 2 Russell's Cr. and Misd. 1374. Thus an indictment lies for cheats against public justice: See *Omealy v. Newell*, 8 East, 364, and cases there referred to; *Fawcett's Ca.* 2 East, P. C. 862: so for supplying prisoners of war with unwholesome food; *Treves's Ca.*, 2 East, P. C. 821: so for supplying Chelsea Asylum with unwholesome bread; *R. v. Dixon*, 4 Camp. 12, 3 M. & S. 11. So against persons in official situations for rendering false accounts, relating to the public revenue; *R. v. Bembridge*, cited in 6 East, 136, 22 Howell's St. Tr. 1: so against overseers and

other parish officers for frauds practised by them upon the public, under colour of their office; *R. v. Cummings*, 5 Mod. 179; *R. v. Martin*, 2 Camp. 268; *R. v. Minister of St. Botolph's, post*, 443; *R. v. Tarrant*, 4 Burr. 2106. So cheats by means of false weights or measures are indictable, as clearly affecting the public; as selling cloth with the Alnager's, or other public seal or mark counterfeited thereon; *Edwards's Ca.*, Trem. P. C. 103; *Warrell's Ca.*, Id. 106; *Pinkney's Ca.*, *supra*. This definition was recognized in the following case, where a pawnbroker was indicted for selling a gold chain under the sterling alloy, as and for gold of the true standard weight, and the offence was held not to be indictable. Lord Mansfield said, "It is certainly an imposition; but I incline to think it is one of those frauds only, which a man's own common prudence ought to be sufficient to guard him against, and which, therefore, is not indictable; but the party injured is left to his civil remedy." *Aston, J.*, referring to *R. v. Wheatley*: "I rather think this is a private cheat: it is not selling by false measure, it is only selling under the standard;" *R. v. Bower*, 1 Cowp. 323. On this case, Mr. East observes, "if the stamps or marks required by the statute on plate of a certain alloy had been falsely used, it should seem that an indictment might have been sustained;" 2 East, P. C. 820 (b). "To make an offence indictable at common law, it must be public in its nature. And the distinction which has been taken in the case of using false weights and measures, shews it more clearly than any other. If a person sell by false weights, though only to one person, it is an indictable offence: but if, without false weights, he sell to many persons a less quantity than he pretends to do, it is not indictable:" *Per Buller, J.*, in *Young's Ca.*, 3 T. R. 104. Those cases of cheats and frauds in private transactions, which have been held indictable, will prove on

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examination to have amounted to conspiracy or forgery, which are substantive offences in themselves;—see 2 East, P. C. 817. It is also necessary that the cheat or fraud should have been effected by a false token, and not by a bare lie or affirmation; see *R. v. Lewis*, Say. 205; *Reg. v. Jones*, *supra*; *Reg. v. Hannon*, 6 Mod. 311; *Nehuff's Ca.*, Salk. 151; *R. v. Bryan*, 2 Stra. 866: nor by a token of no more credit than an assertion, as by a check upon a bank, on which the defendant knew he had no authority to draw; *Lara's Ca.*, 6 T. R. 565, 3 Leach, C. C. 647; see *Wilder's Ca.*, *supra*, and *R. v. Gibbs*, 1 East, 173, and the notes. But a similar offence, by means of a check, was held indictable under 30 G. 2, c. 24; *R. v. Jackson*, 3 Camp. 370. So a miller is not indictable for detaining a certain quantity of wheat, sent to be ground, it being a matter of a private nature; *Chan-*

self's Ca., 2 Stra. 793. So where a miller received good barley to grind, and returned bad and musty meal, it was held not to be an indictable offence.—Lord *Ellenborough*; “If the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but, as it now is, it does not seem to be more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing, such as is adverted to in *R. v. Wheatley*, and the other cases, as not being indictable; *R. v. Haynes*, 4 M. & S. 214. See 1 Hawk. P. C. c. 71, s. 2, East, P. C. 821; 2 Rust. C. & M. 1361, and *R. v. Rispal*, *post*, 368.

EASTER TERM,—1 GEO. III. 1761.—K. B.

HAMILTON v. MENDEZ.

S. C. 2 Burr. 1198.

Insured, who abandons, can only recover for the actual loss at the time of his abandonment.

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ACTION on a policy of insurance. Special case. Ship *Selby*, burthen 200 ton, valued at 1200*l.* was insured from Virginia to London on the common peril, at fifteen guineas *per cent.* Defendant underwrote 100*l.* Plaintiff had an interest in the ship. On 12th March, 1760, she sailed from Virginia. On 6th May, was taken by the *Aurora* *privateer, who took out seven hands out of nine that were on board, and put a prize-master on board to carry her to France. On 23d May, she was retaken off Bayonne by the Southampton man of war, and brought into Plymouth. On 23d June, plaintiff, who lived at Hull, gave orders to abandon his interest. His agent, on 26th June, acquainted the defendant with these orders. Defendant refused to pay for a total loss, but offered to pay average, salvage and all losses and expences. On 19th August, she was brought into the port of London by order of the owners of the cargo and the recaptors. It was also stated, that the ship sustained no damage in the hands of the enemy.—*Qu.* Whether, on the 23d or 26th June, the plaintiff had a right to abandon the ship and recover for a total loss or only for an average loss. Damages in the former case, 98*l.*; in the latter, only 10*l.*

This case was argued in this Term, by *Morton* for the plaintiff, and *Aston* for the defendant; and again in Trinity Term following, by *Norton* for the plaintiff, and *Gould* for the defendant.

Morton argued, that notwithstanding stat. 19 Geo. 2(a),

(a) C. 37, s. 1. This act does not extend to insurances of foreign property and on foreign ships; *Thellusson v. Fletcher*, 1

Doug. 315; *Per Lord Kenyon*, in *Cranford v. Hunter*, 8 T. R. 23.

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there was no occasion to have the property of the insured valued afterwards, in case of a loss. If he proves any interest, however minute, he may recover the sum insured. That in this case he has his election, to abandon or not. If he does abandon, it is similar to an insurance, interest or no interest: If he does not, he must receive according to a valued interest, upon this which is a valued policy. In either case, no injustice is done to the underwriter, who has his premium; and underwriters had rather insure interest or no interest, because the premium is higher (b).—This is a total loss. Taking by the enemy and shipwreck *æquiparantur*; Roccus. 287.—Subsequent events, whereby the insured may be no loser, shall not prevent him from recovering. An insurance interest or no interest, that a ship arrives at such a port on such a day: If the ship never sails, plaintiff no loser; yet held he shall recover. Roccus. 227, not. 66.—According to Grot. l. 3, c. 6, pag. 814, twenty-four hours' capture alters the property. This is questioned by Bynkershock, l. 1, c. 4, who states it to be, *when all hope of recapture is gone. In either case, the present plaintiff had lost his property in the present instance, and then became entitled to recover against the insurer.

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Aston, for defendant, argued that *total loss* was a technical expression, to signify an utter impossibility of pursuing the end proposed. It is not peril of loss, but a clear and absolute loss, that constitutes this total loss:—when all probable hope of recovery is gone; that is, when the ship is in the enemy's ports, *in tuto, in loco securo*; Consolato del Mare; Rocc. Notabil. 50; Ordinances of France, A. D. 1681, sect. Insurance, art. 46. — of Bilboa, 1738, art. 32, — of Middleburgh, art. 26, — of Rotterdam, art. 62, 64.—Insurances, interest or no interest, are not to the purpose. There the whole wager is upon a total loss ever happening. It is like a wager, that a man is robbed between London and York. The man is robbed; the robber taken; the money recovered; yet the wager lost. Stra. 1250(c). If ships were to be rated according to the value inserted in the policy, the insurers must always lose. If rated too high, the insured would always abandon.—Valued policy has no other or different effect from an open one, except in the case of a total

(b) "A valued policy is not to be considered as a wager policy, or like 'interest or no interest:' if it was, it would be void by the act of 19 G. 2. It is settled that upon valued policies, the merchant need only prove *some* interest, to take it out of the act, because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing. But if it should come out in proof, that a man had insured £2000, and had interest on board to the value of a cable only, there never has been, and I believe there never will be a determination, that by such an evasion the act of Parliament may be defeated;" *Per Lord Mansfield*, in *Lewis v. Rucker*, 2 Burr. 1171.

"On the construction of the act, it has uniformly been held, that a valued policy is not void. It is incumbent on the plaintiff to prove *some* interest, but it is not necessary to go into the whole value." *Per Lord Mansfield*, in *Grant v. Parkinson*, Park's Ins. 402 (ed. 1817); Marsh. Ins. 97 (ed. 1808), S. C. And Mr. Just. *Park* lays it down, that to recover on this kind of policy, the insured need only prove that he has an interest, without shewing the value; but that if it appear, that the interest proved is merely a cover to a wager, in order to evade the statute, there is no doubt such a policy would be void. *Id.* 401.

(c) *Dean v. Dicker*, cited *ante*, 198.

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loss; then, indeed, the loss must be taken at the valuation inserted in the policy: but, upon an average loss, a subsequent valuation must be made^(d). (*N. B.* The verdict finds only 10*l.* for the average loss, which is one-tenth of the sum insured; whereas the salvage on re-capture amounts to one-eighth of the real value. So that it appears, that the jurors found, she was overvalued at 1200*l.* which the plaintiff's counsel urged, that they, the jurors, had no right to enquire into.)

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In Trinity Term, *Norton*, for the plaintiff, argued, that abandonment and total loss are not incompatible. Total loss is, where nothing [is] left worth saving. Abandonment is naturally consequential on such a loss. Right of action, once fairly vested, can't be taken from the plaintiff, without *proof of fraud. It is like a breach of condition, which gives action to covenantee; and which cannot afterwards be devested. This right of action accrued 6th May. In case the plaintiff can only recover for an average loss, and that average loss is to be adjusted by a public sale at a great distance from the owner, this is drawing such a line of property, as the owner never meant to submit to.

Average loss on a valued policy estimated by the real value of the goods on board.

Gould, for the defendant, cited *Lewis* and *Rucker*, P 1 Geo. 3(e), where it was determined that, in adjusting an average loss on a valued policy, the real loss sustained on the goods actually on board shall be the measure of the damages; and not the valuation in the policy, on which the underwriter received his premium.

Lord MANSFIELD, C. J.—Plaintiff has averred in the declaration, as the basis of his demand, that the ship became wholly lost to him. And the question will be, whether the plaintiff, who at the time of his abandoning had sustained only a partial loss, has now, by abandoning, a right to recover for a total loss.

Owner may abandon if the voyage be not worth pursuing.

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Four points have been insisted on by the plaintiff's Counsel. 1st. That by the capture, the property was changed from the owners to the captors. This, as between insurer and insured, signifies nothing; especially as, by the marine law, no property is changed till condemnation; and by our act of Parliament^(f), the *jus postliminii* is perpetual. 2dly. That while the ship was in the hands of the enemy, it was a total loss. This is not controverted. 3dly. That recapture makes no difference. Here lies the difficulty. This case stands on its own circumstances. It is not a general rule, that upon a recapture you can't abandon. If the voyage becomes not worth making, you certainly may. This was the case of *Goss* and *Withers*, 32 Geo. 2(g). There was great damage; the ship under a disability to pursue her voyage, and the salvage amounted to half the value. This is a *very different case. Here the ship was in effect pledged to the recaptors for one-eighth of its value, and, when that was paid, was in as good plight as before. The voyage was actu-

(d) Park's Ins. 164, acc.
(e) 2 Burr. 1167.

(f) 29 G. 2, c. 34, s. 24.
(g) 2 Burr. 683.

ally performed. 4thly. That during the capture, a right vested in the plaintiff to recover of the insurers, which could not afterwards be taken from him. But the plaintiff's action is for indemnity; and it is repugnant to reason, that plaintiff, on an action for indemnity, should recover for the whole, when a part only is lost, or perhaps even nothing at all. If a tenant commits or suffers waste, and repairs before action brought, the landlord cannot recover; Co. Litt. (h). A surety can't be sued for more than the party suffers. This is the first attempt ever made to make the insurer pay for a total loss upon an interest-policy after the goods [are] actually recovered. If the thing be recovered, no artificial reasoning shall vest a temporary property in the captors, merely to prejudice the insurers.

The consequences of the present case are decisive. No man under these circumstances would choose to abandon, but for one of these two reasons:—1. Having overvalued his interest; this ought not to be encouraged; it is productive of fraud, contrary to the spirit of the marine law, and the stat. 19 Geo. 2; no man should avail himself of it: 2. That the market is fallen since he insured. But as the insurer can have no advantage by the rise of the market, he ought not to lose by the accidental fall of it. Were there occasion to resort to it, this argument alone would be decisive. But upon principles it is plain enough. The property of merchants should not depend upon subtle niceties and speculative refinements drawn from the Roman *jus postliminii*, but upon plain reason. We desire it may be understood, that the only point now determined is, that on a valued policy a plaintiff cannot recover more than the actual loss which has happened, at the time when he chooses to abandon. We give no other opinion.

Judgment for the plaintiff, with damages for the average loss only (i).

(h) 53 a.

(i) This may be considered as a leading case on the subject, and has been recognised and acted upon in several subsequent cases, particularly in *Miles v. Fletcher*, 1 Doug. 231 a; *Cazalet v. St. Barbe*, 1 T. R. 187; *Bainbridge v.*

Neilson, 10 East, 329; *Parsons v. Scott*, 2 Taunt. 363; *Falkner v. Ritchie*, 2 M. & S. 290. See also *M' Masters v. Shoolbred*, 1 Esp. 237. The cases on this subject are collected in Park's Ins., tit. *Abandonment*, 228 (ed. 1817).

[ZOUCH, Lessee of] WOOLSTON v. WOOLSTON.

S. C. 2 Burr. 1136.

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CHRISTOPHER Woolston, in 1707, devises lands to trustees, and declares the trust in strict settlement to his sons, James and John, successively; with power for the persons in possession, from time to time, by deed or deeds, to limit and appoint to and for any wife or wives, an estate for life of all or any part of said lands, which altogether were of the annual value of 190*l.* In 1712, James married, and by settlement appointed 98*l. per annum* to trustees and their heirs, in trust for

Power to make a life estate to one's wife may be executed at different times.

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Elizabeth Bogan, his then wife, the now defendant, for and in name and in lieu of her jointure: with proviso, that if Elizabeth should not within three months after widowhood release her dower, the settlement should be void, and a covenant, that the children and all persons entitled should quietly enjoy according to the limitations of the devise. In 1738, James Woolston, by another deed, released this condition of giving up her dower. In 1751, James Woolston, by another deed, reciting the former, and that he had since received 600*l.* additional fortune, therefore, for increase of her jointure, he appoints in the same form all the rest of the land, in trust for her during life from and after his decease. James died *sans* issue male, and the remainder came to John, the son of John, who brought this action (*k*). The question was, whether this additional jointure in 1751, was a good execution of the power; it being contended on the part of the plaintiff, that the power was completely executed in 1712.

Lord MANSFIELD, C. J.—This is so clear a case, it is a pity the old lady, the defendant, should be disturbed or agitated any more.

There are two points.—1. What is the natural construction of this power? 2. Whether the deed of 1712 has barred and precluded all subsequent executions of the same power?

1st. On its creation there was nothing to bound it but the will and discretion of the husband. Being a trust estate, [*282] *there was no occasion to express, that any settlement by virtue of this power should be in bar of the woman's dower. The devise is drawn, as if intended that the power should be executed at different times. "By deed or deeds, from time to time,"—it is said, this was meant to take in the case of subsequent marriages; the words "wife or wives" would alone be sufficient to answer that. For common sense would shew, that one wife must be dead, before there could be any new appointment to another. The former words are therefore nugatory, unless thus interpreted. Case of *Harvey* and *Harvey* (*l*), in Chancery, was, where a power was given to appoint not exceeding 600*l.* *per annum for a jointure*: one specific, entire thing. The question was, if this power could be executed partly at one time, partly at another. Lord Chancellor thought it clear, that it might be. On a rehearing, Mr. *Wilbraham* gave up the point. The present case, not being *for a jointure*, is so much stronger, that if *Harvey* and *Harvey* had been otherwise determined, I think this appointment would be good.

2dly, It is doubted, whether the settlement of 1712, has not barred or exhausted all James's power: and it is objected, that this is in *lieu of jointure*, and must therefore be looked on as one entire thing; and that there is also a covenant, that the children and all other persons entitled should enjoy according to the limitations of the will. As to the covenant, this amounts to no

(*k*) Ejectment.(*l*) 1 Atk. 561.

more than, that the testator had power to devise, and that enjoyment shall be accordingly. If Elizabeth, the mother of these children, had died, and James had married again, there is no colour, but that he might have limited the whole estate to a second wife, their step-mother. Would the friends of Elizabeth have tied up his hands as to her, and left him at liberty, as to any future wife? Thus the case would have stood, had there been issue male of the marriage: *a fortiori* it will stand so, now the question is with the son of John, the remainderman. As to its being in lieu of jointure—In *Harvey* and *Harvey*, the first estate created was “*in full* for her jointure, “and *in full* recompense of her dower.” This was argued, with some plausibility, to be a full execution of the power. Lord Chancellor thought there was no weight in it. The husband had his election to bar her claim, if he pleased: this did not extend to bar his own subsequent power. Lord Chancellor went further, and said, the plaintiff being a remainder man, it could not be in contemplation of the parties, that the power should be construed strictly in his favour. In the present case, it was not only in the power of the husband, but was also his duty, to make a farther provision for his wife, as he had received an additional fortune. It also appears, that he left daughters, and ten grandchildren by one of them.

Upon this head of execution of powers, for want of a liberal way of thinking, and of making proper distinctions, some of the early cases have been decided so extremely strictly in Courts of law, that it has forced Courts of equity to make those determinations, which ought to have been made, in the legal jurisdiction. It is true, naked powers (*m*) must be taken strictly, both in Courts of law and in equity. Other powers, which are a mode of property, are either merely legal, independent of the statute of uses; as powers of leasing by ecclesiastical persons, by tenant in tail, by the Crown, &c.; here what is a void execution in law, is void in equity also:—or, they are derived from the statute of uses. And what is a good execution of such a power in equity, ought to be good in law; the whole being derived from equity (*n*). *Rattle* and *Popham*, Stra. 992; case of doing less than the power. Husband appointed a chattel estate determinable on the wife's life, instead of a freehold for life absolute: Determined at law to be void. They went into equity: Lord Talbot held it good, upon the face of it, and made the remainderman pay the costs, both in law and equity. Upon the whole, I think the power well executed.

DENNISON, J., same opinion. FOSTER, J., absent.

WILMOT, J.—These powers are so necessary for forwarding marriages, that Courts of law and equity should go by the same rule in their construction. And I think we should not listen to those nice distinctions, which savor more of the sophistry of

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Naked powers to be construed strictly.
Powers coupled with property, if merely legal, construed equally strict in equity as at law.
Powers under statute of uses, to be construed as liberally at law as in equity.

(*m*) 1 Cowp. 263. See *Doe v. Smith*, 1 Brod. & B. 97; 3 J. B. Moore, 339; 499.
(*n*) See *Holmes v. Coghill*, 7 Ves. Jun. S. C. in D. P. 2 Brod. & B. 475.

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the schools, than the manly reasoning which ought to prevail in Courts of law. It is to be lamented, that at the making of the statute of uses, Courts of law did not adopt the same rules in construing powers as Courts of equity did. This case needs not the assistance of this doctrine. It is the established practice in conveyancing, when it is intended *that a power should be executed no farther, to release it. Therefore this deed of 1712 cannot be supposed tantamount to a covenant not to execute it any farther. Enjoyment according to the limitations of the will must mean, "subject to the power given by the will."

Judgment for the defendant (o).

(o) This case was recognised in *Doe v. Milborne*, 2 T. R. 721. See Sugd. Pow. 66, 279, 345 (3d ed.).

STEVENS v. EVANS and LLOYD and Others.

S. C. 2 Burr. 1155.

Administrator
not liable to pay
poor's rate, for
the intestate; at
least not dis-
trainable with-
out summons.

TROVER. Not guilty. Special case, 12th of April, 1759. Vesey was assessed to poor's rate in the parish of Wix in Essex; 18th July, 1759, he died; 12th December, administration granted to Stevens the plaintiff; 14th January, 1760, defendants Evans and Lloyd granted a warrant of distress, which the other defendants executed on Stevens for this rate, and distrained his cattle.

Norton, for the plaintiff. I. The rate is bad *ab initio*; being, 1st, To reimburse overseers; see *Thornhill's Case*, Lord Rayn(p). 2dly, It is made for half a year; Salk. 532(q). 3dly, No demand is stated before the distress made; no refusal by the administrator, but only by the deceased and his widow. II. The goods of the intestate are not liable to this distress in the hands of administrators. No instance where done; therefore strong presumption that it cannot be done. In short [as to] rates (which alone are allowed by law) it is an object too minute to follow the personal assets. This is a charge on the *person*, not the *thing*, like land-tax. No power to make such distress expressly given by law;—it cannot be inferred, for a power under a statute must be strictly pursued. A new power cannot be usurped by this inferior jurisdiction. This [is] no debt on the effects. If so, in what class shall it be ranked? How, in case of deficient assets, can an executor pay it without hazard. In a similar case, which was remediless at law, Parliament was forced to interpose. Till stat. 17 Geo. 2(r), the administrator of an overseer was not liable to account to his successor. This is a legislative exposition of stat. 43 Eliz. and shews, that when the powers of that act are defective, Parliament only can amend them.

(p) Probably *Towney's Ca.*, 2 Lord Raym, 1009, Salk. 531, 6 Mod. 97, and see *R. v. Mayor of Gloucester*, 5 T. R. 346.

(q) But see *R. v. St. George*, *post*, 694. (r) C. 38, s. 11; amended by 41 G. 3, c. 23, s. 9.

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**Bishop*, for defendant.—[I] shall not enter into the previous objections. The main question intended to be settled, is of great and general importance. It must for ever arise, unless where a man dies the night before a rate is made. By sect. 4, of stat. 43 Eliz. [c. 2,] it is sufficiently implied, that assets are liable.

DENNISON, J., (*absente* Lord Mansfield).—The question intended to be brought before the Court is stated, and is only the latter one, concerning the levy of the rate on executors or administrators. Strange, that it never was brought before the Court before. As to myself, whatever the practice may be in the country, I take it, that if a person is rated under stat. 43 Eliz., wherein a particular method is prescribed to recover that rate, you cannot make use of any other. No action of debt will lie for a poor's rate. Consider the nature of the remedy given by the act of Parliament, You are to distrain by warrant. What? The goods of the offender. This shews, 1st, That non-payment is an offence, not a debt: 2dly, What the goods are, which are so distrainable, viz. those of the offender. Well—What authority have we, by law, over the goods of the representatives? None at all. We can't consider inconveniences that may be suggested; but the mere words of the law which gives the remedy. As at present advised, I think the action will lie.

FOSTER, J., *absent*.

WILMOT, J.—I have not the least doubt imaginable. Though it is not stated in the case, that a demand (s) was made of the administrator; yet it is stated in the warrant. But no summons appears to have issued; and I think it was necessary to convene the administrator before the justice, before a warrant could legally issue to distrain. Had a warrant issued regularly before the death of Vesey, it might have been doubtful, whether necessary to convene the representative. Similar to a *feri facias*, which may be executed after the death, if issued before; whereas, otherwise, a *scire facias* must issue. But this warrant is the first that issued. *As to the principal question, as at present advised, I doubt, whether the charge absolutely dies with the person. The point was never solemnly determined. But in *Wallis, Administrator, v. Hewit*, *Sittings post Hil. 5 Geo. 2, coram Eyre, C. J.*, the same question came on. There was not only a demand against the intestate, but also a warrant of distress, issued before his death. *Eyre, C. J.*, at *Nisi prius*, thought, that a levy could not be made on the goods in the administrator's hands, without summoning him to shew cause. A case was made, but I can't learn, that it was ever argued in the Common Pleas. However, in the present case, it is contrary to all reason, even supposing it a debt, that the administrator should be charged to pay it without summons. He may have a judgment debt of his own, which will cover the

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(s) See *Hurrell v. Wink*, 2 B. Mo. 417, 8 Taunt. 369, and *Milward v. Coffin*, *post*, 1330.

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whole of the assets. Shall he be stripped of it, without even hearing what he has to say (t)?

Postea delivered to the plaintiff.

(t) I have not been able to meet with any other case on this point, which therefore remains undecided. See 1 Nolan's P. L. 231 (ed. 1814), and 4 Burn's Just. 116 (ed. 1820).

KING v. WALKER.

Statute of limitations extends to persons in Scotland.

ASSUMPSIT. Plea, *non assumpsit infra sex annos*. Replication, that the plaintiff was resident in foreign parts out of the kingdom of England, viz. at Glasgow in Scotland; and therefore could not bring his action sooner. Demurrer, and joinder in demurrer.

Morton, for the defendant, observed, that the exception in the statute of limitations, 21 Jac. 1, c. 16, in favour of absent plaintiffs, says expressly, that they must be persons *beyond the seas*.—That, till the Union of the Crowns under Jac. 1, the constant language of the Legislature was, persons *out of the realm*. It was altered on that occasion, when the whole island came under the government of one Prince; and the reason holds stronger now, when not only the Crowns, but also the kingdoms are united.

[*287] *Wedderburn*, for the plaintiff.—The question is, Whether persons out of the jurisdiction of the Courts of this country, *though not literally beyond the seas, or out of the King's subjection, are not entitled to the same benefit. The statute of non-claim does not affect persons in Scotland. In Sir Robert Brooke's reading on stat. 32 Hen. 8, wherever the statute says, *out of the realm*, he uses in his comment the expression, *beyond the seas*. This and many other instances shew, that these expressions have usually (though inaccurately) been used as synonymous terms. It has been questioned, whether Scots bills of exchange are inland or foreign bills, and been determined by *Ryder*, Chief Justice at Guildhall, that they were foreign bills (v).

DENNISON, J. (*absente* Lord Mansfield).—This is a new experiment, and in the case of a positive law. The statutes 21 Jac. 1, and 4 & 5 Anne (u), are both express, that the party to be excused must be beyond the seas. Here the plaintiff pleads, that he was in *foreign parts*, viz. in Scotland. What does he mean by *foreign parts*? He must be *beyond the seas*. That is the old and true expression. Before the Union, England was an island of itself; since the Union, Scotland is made a part of it.

FOSTER, J., absent.

WILMOT, J.—This is a very clear case. The statute of limitations ought to be construed liberally. I think it a noble

(v) But see 55 G. 3, c. 184, ss. 23, 25, 29, Sched. P. 1.

(u) C. 16, s. 19.

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beneficial act. *Interest Reipublicæ ut sit finis litium*. There is no such kingdom as England now. Plaintiff, therefore, while in Scotland, was not out of this realm. Besides, that is not now the phrase: [the] Legislature, by altering it to *beyond the seas* at such a critical juncture, seem to have pointed at this very case, of dwelling in Scotland. It is a great question, and very doubtful, whether the statute of non-claim does not now extend to residents in Scotland. As at present advised, I should rather think it does. It is true, that since the Union, a writ of *ne exeat regno* has been issued from the Court of Chancery to prevent a man's going to Scotland; *Done's Case*, 1 P. W. 263 (w). But the condition of the recognizance was a special one; not to go out of this realm, or to Scotland. Had these *words been omitted, going to Scotland would not have forfeited the recognizance (x).

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Judgment for the defendant, *nisi*.

(w) But see *Hunter v. Maccray*, Ca. temp. Talb. 196, and 15 Vin. Abr. *Ne exeat Regno* (B). See also *Baker v. Dumaresque*, 2 Atk. 66; *Bernal v. Marquis of Donegal*, 11 Ves. Jun. 43.

(x) So *Holt*, C. J., held, that Dublin,

or any place in Ireland, is beyond the seas, within the meaning of 21 Jac. 1; *Anon.* 1 Show. 91; *Smith v. Hill*, 1 Wils. 134, S. P. And see *Strithorst v. Grame*, post, 733.

Lessee of LUOAS v. FULFORD.

S. C. 2 Burr. 1177.

IN ejectment, the plaintiff offered to give in evidence, an examined copy of a bill in Chancery, contained in two close sheets of paper, each stamped with treble sixpenny stamps; but the matter was equal in quantity to forty office copy sheets: and also, an examined copy of an amended bill, in three close sheets, each stamped with treble sixpenny stamps, the matter whereof would have extended to sixty office sheets. By the Stamp Acts, 9 & 10 W. 3, c. 25, sect. 64, &c. every copy of proceedings in Chancery is charged with a duty of three penny stamps on each sheet; otherwise, cannot be given in evidence. And it is also provided, that all proceedings in any Court shall be written in the usual manner (y). Verdict for the plaintiff, subject to the opinion of B. R. whether or no this evidence ought to have been admitted.

Close copies of proceedings in any Court, may be given in evidence in another Court, without any but the common stamps.

Stowe, for the plaintiff, cited the *King* and Bishop of *Chester*, 8 Mod. [364]; and argued, that the evidence ought to have been received; because this was not a copy made out by the clerks of the Court, but delivered from attorney to client. That the act does not define the number of words that shall be in a sheet, but leaves it to usage; and this is the usual practice between attorney and client.

(y) The duties are now regulated by 55 G. 3, c. 184, Sched. P. II. 3. It seems that where it has not been the practice to write such copies on both sides of the

stamped sheet of paper, an office copy so written would be irregular; *Champneys v. Hamlin*, 12 East, 294.

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Aston, for the defendant, insisted, that the revenue being concerned, the statute must be construed strictly. That no copy is properly such a one as the statute meant, but an office copy; and that it was time that a practice contrary to law, if any such there was, should be abolished.

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LORD MANSFIELD, C. J.—The whole question is, whether it is necessary to give office copies in evidence in all *Courts whatsoever. In causes depending before the Court of Chancery, office copies of proceedings therein are the very records of the Court, and prove themselves. No other copy can be there produced. In other Courts, even office copies of Chancery proceedings must be proved to be genuine, by parol evidence. Two clauses of the Stamp Acts are the only ones to be considered. It must first be observed, that when stamps were originally imposed, there were two kinds of copies in common use:—one an office copy, to be made use of in the Court to which the cause belonged. This contained only a stated number of words, by immemorial custom, probably introduced to enlarge the fees of the officers:—the other a common close copy, to be used, when proved, in any other Court or place. Then comes the act, and lays (in one clause) a duty upon every sheet of copy; and the next clause directs all proceedings in any Court to be written in the same manner as before. Is this latter clause a legislative provision, that office copies only shall be used in evidence, where they were not used before? It is not to be conceived, that in order to raise so small a duty (for originally it was only *1d. per sheet*), the Legislature intended to put the parties to the expence of 60*l.* to take office copies, merely to give in evidence. The Stamp Acts have not always been construed strictly. It has been determined, that the stamp-duties do not extend to any proceedings before either House of Parliament.

It is a question of pretty general importance, and therefore proper to be well considered, before it is finally determined. But, for my own part, I have no doubt at present.

N. B.—“ It appeared, that some cautious practicers had been “ used to stamp their close copies with as many stamps as “ would have been required to an office copy.”

Afterwards, in Trinity Term, the Court declared, it was too clear a question to enter into again, and therefore ordered the *postea* to be delivered to the plaintiff(s).

(s) *Lady Dartmouth v. Roberts*, 16 East, 334; *Saller v. Turner*, 2 Camp. 87; *Hodgkinson v. Willis*, 3 Camp. 401.

TRINITY TERM,—1 GEO. III. 1761.—K. B.

JANS *qui tam* v. HUTTON.

WINN moved to set aside proceedings for irregularity. Action on a penal statute. Plaintiff had taken out five rules for time to declare (a), and served none of them on the defendant, till the last was taken out; and then served them altogether, and, at the same time, also delivered a declaration to the defendant. It was urged, that the rules, not being served in time, were expired; and that therefore the defendant was out of Court, and could not be served with a declaration. But, *per Cur.*—You might have signed a *nonpros.* for not declaring in time (b); but, having omitted that, and the plaintiff having now served his rules, he redeems his irregularity, and you cannot now take advantage of it.

Though a rule for time be not served, yet if no advantage be taken of it, the irregularity may be saved by a subsequent service.

(a) If the plaintiff be not ready to declare, before the end of the next Term, after the return of process, he may obtain a *side-bar*, or Treasury rule for time to declare, until the first day of the ensuing Term: and if he be then unprepared, he may obtain rules for further time to declare from the beginning to the end of the Term, and from the end of one Term to the beginning of another, alternately, as often as may be necessary. But after several rules have been obtained, the Courts will make a peremptory one for him to declare, before the end of the Term in which the motion is made. And in C. P. where he does not declare, after having obtained time for that purpose, the defendant may sign judgment of *non. pros.* without giving a rule to declare; *Towers v. Powell*, 1 H. Bla. 87—Tidd's Pr. 426 (ed. 1821); and see *post*, 759.

(b) "Upon all process returnable the

first, or any other return in any Term, the plaintiff shall have liberty, to the end of the next ensuing Term, to deliver his declaration to the defendant's attorney, or leave the same in the office; and the defendant's attorney having entered his appearance with the proper officer, as of that Term in which the process is returnable, and in C. P. given a rule to declare in the proper office, at the end of the ensuing Term, or in four days after the end thereof, and called on the plaintiff's attorney or clerk in Court, if he can be found; the defendant may, at any time in the vacation of such ensuing Term, after the rule for declaring is out, sign his *non. pros.* for want of a declaration, and not afterwards: and the plaintiff shall not, without leave of the Court, have any longer time to declare, other than the time to be limited by the defendant's rule." Tidd's Pr. 425—468.

Lessee of METHOLD v. NORIGHT.

ASHURST moved (on the authority of Lessee of *Hollings and Dunch*, Hil. 1 Geo. 3), that service of a declaration in ejectment at the house of the tenant in possession, on 13th of *May last past*, might be good service; it having formerly been usual to grant such rules, with respect only to future service, and not with any retrospect. But that, in the case relied upon, this rule was first altered in the King's Bench, it having before been the course of Common Pleas (c).

Service of ejectment at the house may be made good by a subsequent rule of Court.

Rule to shew cause; and that service of this rule at the house might be good service. *N. B.*—This motion went off afterwards, upon terms of compromise (d).

(c) *Fenn v. Dean*, Barnes, 192.

(d) See *Gulliver v. Wagstaff*, *post*, 317.

YATES v. CARLILE *et al'*.

S. C. Ante, 270.

Vexatious plaintiff, how censured.

THIS cause went down to trial on the feigned issue, Carlile being plaintiff, and Robinson defendant. But the defendant Robinson made default at the assizes, and a verdict was had against him. And now, upon motion and solemn argument, the Court directed this verdict to be entered of record, and all the costs incurred in every stage of proceedings (which amounted, it was said, to near 1,000*l.*) to be paid by Robinson.

THE KING v. SCOTT, &c.

S. C. 3 Burr. 1262.

Qⁿ. 1. Whether an acquittal of all but two, in case of riot, is an acquittal of all? 2. Whether an acquittal of a riot is also an acquittal of an assault laid in same indictment?

MORTON moved in arrest of judgment. Five persons were indicted for a riot and assault (*e*). Another count against three only. The Jury acquitted all but two: whereupon he insisted, that it was an acquittal of all; because two cannot make a riot: Poph. 202, *Harrison and Errington*, Obj. 2; Salk. 593, *K. and Heaps*; Lord Raym. 484, *K. and Sudbury*, S. C. (*f*); 3 Mod. 72, *K. and Colson* (*g*); which shews, that if a battery (and more reasonably if only an assault) be joined with a riot in an indictment (*h*), an acquittal of one is an acquittal of both.

Shew cause. See *S. C. post*, p. 350.

(*e*) It appears from 3 Burr., that six persons were indicted: that the first count charged, that six riotously and routously did follow one A. B. along the street, insulting, abusing, menacing, and hollowing after him; the second count charged, that three riotously and routously burnt the said A. B. in effigy: and that two were convicted, two acquitted, and two had died untried.

(*f*) 12 Mod. 262, S. C.: *R. v. Soley*, Salk. 594, S. P. See 1 Hawk. P. C., c. 65, s. 1; Russ. Cr. & Misd. 385.

(*g*) That was an information against the defendants, that they with others did riotously assemble and set up a bank to divert a water-course. The Jury found

them all guilty *quoad factionem ripas*, and not guilty *quoad riotum*: on which judgment was arrested, because they were acquitted of the riot, and setting up the bank was only a civil injury.

(*h*) That is, in the same count. In *R. v. Heaps & Sudbury*, where two only of several were convicted, the riot and battery were charged in the same count, and Holt, C. J., said, "The battery is but part of the riot, and the defendants, being acquitted of the riot, are acquitted of the whole of which they are indicted: but if it had been charged, that they with divers others had committed this riot and battery, the King might have had judgment."

HUME v. EAST INDIA COMPANY.

East India charter-party of affreightment.

ACTION of covenant (*i*) on the charter-party of affreightment constantly used in this behalf, between Hume and others and the East India Company (*k*), whereby the plaintiffs agreed

(*i*) Lord C. J. Abbott, in his *Treatise on Shipping*, says, "But query, whether the form of action was properly adapted

to the case;" p. 218, n.

(*k*) As to which, see 53 G. 3, c. 155.

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to let the ship *Winchelsea* to the Company, for an East India voyage, on certain rates and terms of freight and demorage. The Company covenanted to load her homewards, within three months after her arrival in India; with a proviso, that the Company were at liberty to detain her in their service for one other year, at certain rates of demorage therein specified. And there is also a proviso, that "if the ship did not arrive in safety in the river Thames, and deliver her whole cargo there, the Company should not be liable to pay * any of the sums agreed [*292] to be paid for freight or for demorage, nor should the Company be liable to any demands for the ship's earnings, or any other employment."

The ship sailed from London 16th February, 1746-7. Arrived in the East Indies 30th of September following. The Company did not lade her homewards within the first year and three months, which expired 30th of January, 1748-9, but employed her in their service, and towards the end of the year sent her with stores to Fort St. David's, where she arrived 17th February, 1748-9; and on the 22d of February following, the Master wrote to the President at Fort St. David's, declaring, that unless the Company would allow demorage, after the rates of the charter-party, he protested against the Company for all damages, loss of time, or other accidents. Whereupon the President and Council agreed in writing, that the owners should be allowed demorage for so long time as she should be detained in the Company's service in India. She was detained till the 12th April, 1749; on which day, before she was dispatched; or had any loading for England, she was wrecked and lost in a storm.

The plaintiffs applied to the East India Company; insisting upon demorage from the 31st of January, 1747-8, to the loss of the ship, and for a satisfaction for the loss of the ship, and for freight. The defendants insist, that as the ship never returned to England, they were not liable to the payment of any of these demands.

Hereupon this action was brought, and four breaches assigned: whereof the first and principal was, for not loading the ship homewards, on or before the 31st of January, 1748-9; but detaining her till lost, whereby she lost all her earnings and the profits of her voyage. The defendants pleaded, that she was detained with consent of the Master. Issue. Tried at sittings after Hil. 1757, before Lord *Mansfield*, C. J. Verdict for the plaintiffs, with 20,000*l.* damages; subject to the opinion of the Court, on the foregoing case and the following questions—

1. Whether plaintiffs are entitled to recover in this action, by reason of the said ship not being dispatched or laden homewards? If so, then 13,269*l.* 6*s.* 8*d.* due to plaintiffs.

* 2dly, If not so entitled, Whether the plaintiffs are entitled [*293] to demorage? If so, then 7,166*l.* 10*s.* 3*d.* due.

After several arguments, in which *Moore* and *East India*

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Company, in *Vernon*, and *Bisse and Black*, King's Bench, circa 1746, were the only cases relied on, the *Company* offered, by way of compromise, to pay demorage from the 31st of January, 1747-8, to the time the ship was lost; which was accepted. After which, Lord MANSFIELD declared, the Court was very clear, that the plaintiffs were entitled to no more, but declined giving any other opinion.

So judgment was entered (by consent of the parties) for the plaintiff, with damages, 8,100*l.* and upwards, the former calculation being erroneous, and costs (*l.*).

(*l.*) See *Hotham v. E. I. Comp.*, 1 Doug. 272; *Ted v. E. I. Comp.*, Abbott on Shipping, 217, n. (ed. 1812); *Maffet v. E. I. Comp.*, 10 East, 468; *Dobrus v. E. I.*

Comp., 13 East, 290; *Faith v. E. I. Comp.*, 4 B. & A. 630; 58 G. 3, c. 83; *Luke v. Lloyd*, ante, 191, and *Edie v. E. I. Comp.*, post, 295.

BASKERVILLE v. BROWN.

S. C. 2 Burr. 1229.

A verdict against the plaintiff in a prior action may be set off against his present demand.

BROWN brought an action against **Baskerville** for 30*l.* and obtained a verdict, **Baskerville** having given no notice of any set-off. But **Baskerville** brought a cross action against **Brown**, for 11*l.* 18*s.* which came on to be tried the same day, soon after the former verdict. **Brown** had given notice of a set-off; and at the trial, *Morton* offered to give in evidence said verdict for 30*l.*, which the Counsel for **Baskerville**, the then plaintiff, objected to. Verdict for plaintiff, but order of *Nisi prius* was made, to refer this question to the opinion of the Court; and if the set-off was maintainable, then judgment for defendant, as in case of nonsuit; otherwise, the *postea* to be delivered to plaintiff.

It was argued by *Norton* and *Yates*, for the plaintiff; by *Morton* and *Stowe*, for the defendant.

Lord MANSFIELD, C. J., gave the judgment of the whole Court.—In the first action, 'twas vexatious and litigious in **Baskerville** not to set off the 11*l.* 18*s.* But **Brown** could not take [* 294] * a verdict with safety for a less sum than 30*l.*; because then it would have appeared on record, that less was owing to him. In the second action, now before the Court, we are, upon full consideration, all clear of opinion, that the verdict might be set off against the plaintiff's demand. For if, at the time of the action brought (*m*), there are mutual demands, they may be set off by the statute. Unless the verdict can be construed to annihilate the debt, the demand remained as well after as before the verdict. The only effect of the verdict is, to make the evidence of the demand conclusive. Justice may be done between

(*m*) A plea of set-off, that the plaintiff was indebted to the defendant at the time of the plea pleaded, is bad: it should state, that he was indebted at the commencement of the action: but leave was

given to amend; *Evans v. Prosser*, 3 T. R. 186, recognized in *Le Brett v. Papillon*, 4 East, 505. And see *Bird v. Randall*, post, 387; *Freeman v. Hyett*, post, 394.

the parties, by remitting, upon the first record, such part of the damages as might have been set off. Therefore, let the present verdict be set aside, with costs of a nonsuit; and a *re-mittitur* as to 11*l.* 18*s.* be entered upon the record of the first action (n).

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(n) So, where, to a declaration for work and labour, defendant pleaded a set-off on a promissory note, and plaintiff replied, that after exhibiting his bill defendant brought an action against him upon the same note, in which action he the plaintiff paid the amount of the note into Court; on demurrer, the Court, on the authority of the principal case, were clearly of opinion that the replication was ill; adding that, if the set-off were proved to the

Jury, and the defendant also succeeded in his action on the note, the plaintiff in this action might bring an *audita querela*, or have some other remedy; *Evans v. Prosser*, 3 T. R. 186. So it is no objection to the set-off of a debt, that defendant had commenced an action for the recovery of that debt, before plaintiff's cause of action accrued: Lord Kenyon being of opinion, that these were *mutual* debts; *Knibbs v. Hall*, Peake's N. P. C. 276.

THE KING v. KINNERSLEY.

MOTION for an information against the printer of Lloyd's Evening Post, for a ludicrous paragraph, giving an account of the Earl of Clanricard's marriage with an actress at Dublin, and appearing with her in the boxes with jewels, &c. (o).

Information for printing an account of a ludicrous marriage between an actress and a married man.

Harvey shewed for cause.—1st. That Lord Clanricard was not a peer of Great Britain. *Sed non allocatur*: for, *per Cur.*, As he is sworn to be a married man, it is a high offence, even against a commoner. 2dly. That this paragraph was taken from another paper (p), against whose printers informations were also moved. 3dly. That in his next paper Kinnersley had voluntarily made a public recantation. *Sed non allocatur*: for, *per * Cur.*, it is high time to put a stop to this intermeddling [* 295] in private families.

Rule made absolute.

(o) See 1 Hawk. P. C., c. 73; 4 Bac. Abr. Libel (A) 2, p. 450; Russ. Cr. & Misd. 330; where the author observes (331, n. u), that the Court of K. B. always exercises a discretionary power in granting an information for a libel, and will, in many cases, leave the party to his ordinary remedy (by indictment); as where the application is made after a great length of time, or where the matter complained of as a libel, happens to be true. And the Court will not grant an information for a private libel, charging a particular offence, unless the prosecutor will deny the charge upon oath; *R. v. Miles*, 1 Doug. 284; *R. v. Webster*, 3 T. R. 388. But see *R. v. Williams*, 5 B. & A. 595. See also *R. v.*

Robinson, post, 541; *R. v. D'Eon*, post, 510; *R. v. Pitt*, post, 380.

It is to be observed, that words spoken, however scurrilous, are not the subject of indictment; Russ. Cr. & Misd. 329, referring to *R. v. Langley*, 6 Mod. 125; *R. v. Bear*, 2 Salk. 417, 1 Lord Raym. 416, *per Holt*, C. J. So, in some cases an action may be maintained for words written, for which an action could not be maintained if they were merely spoken: *per Gould, J.*, in *Fillers v. Mousley*, 2 Wils. 404; *Thorley v. Lord Kerry* (in error), 4 Taunt. 355.

(p) See *Lewis v. Waller*, 4 B. & A. 605.

GRAHAM v. POTTS.

Qⁿ. If a prohibition will lie to Court Christian after a *modus* pleaded, so as no proceeding is had since the plea?

YATES moved for a prohibition to the Consistory Court of York, on a suggestion, that in a suit for tithes, a *modus* had been pleaded (*q*). But it not appearing, that the plaintiff had proceeded since this plea, the Court doubted whether a prohibition would lie. But granted a rule to shew cause.

(*q*) Because "if a *modus* be pleaded and admitted, no prohibition shall go; but if the question be, whether a *modus* or no *modus*, a prohibition shall go; and so is the law, *vis.* wherever the matter, which you suggest for a prohibition, is foreign to the libel, you must plead it below, before you can have a prohibition; otherwise where the cause of prohibition appears on the face of the libel:" *Per Holt, J., Anon.* 2 Salk. 551; *Stone v. Harwood*, Ca. temp. Hard. 357; *Offley v. Whitehall*, Bunb. 17, S. P. But a prohibition was granted on affidavit, that the defendant "answered on oath or pleaded a *modus* in the Court below to the libel;" *French v. Trask*, 10 East, 348. See also *Wilson v. M'Math*, 3 B. & A. 241. Where a *modus* is pleaded (and insisted upon) a prohibition may be granted any time before final sentence; *Darby v. Coe*, 1 T. R. 552. But a prohibition will be granted, even after sentence, where it appears on the proceedings of the Court below, that it had no jurisdiction. Lord Kenyon—"The general grounds of a prohibition to the Ecclesiastical Courts, are either a defect of jurisdic-

tion, or a defect in the mode of trial. If any fact be pleaded in the Court below, and the parties are at issue, that Court has no jurisdiction to try it, because it cannot proceed according to the rules of the common law; and in such case a prohibition lies. Or where the Spiritual Court has no original jurisdiction, a prohibition may be granted after sentence;" *Leman v. Gouley*, 3 T. R. 3; *Carlslake v. Mapledoram*, 2 T. R. 473, S. P. Where a party applying for a prohibition has permitted a fact to be tried below, as where he has set up several customs respecting tithes, and has permitted the Ecclesiastical Court to proceed to sentence, a prohibition will not then be granted, if that Court had original jurisdiction of the cause; *Full v. Hutchins*, 2 Cowp. 422; *Offley v. Whitehall*, *supra*; *Stainbank v. Bradshaw*, 10 East, 349, n. (c) S. P. See also Lord Camden v. *Hume* (in error), 4 T. R. 382, & C. in D. P., 2 H. Bla. 533; *Gould v. Gapper*, 3 East, 473, S. C., 5 East, 845. As to costs in prohibition, see *Trask v. French*, 15 East, 574; and as to declaring, *ante*, 81.

THE KING v. INHABITANTS OF CHESHUNT, HERTFORDSHIRE.

No costs upon indictments for not repairing a road.

INDICTMENT for not repairing a road. Motion to submit to a small fine, on certificate that the road was now in repair.

Norton, for the prosecutors, insisted, that the defendants should pay the costs of the prosecution, before they should be at liberty to make such submission.

But *per Cur.*—It is contrary to the practice of the Court. So set a fine of 6s. 8d. (*r*).

(*r*) But see *R. v. Wingfield*, *post*, 603.

EDIE and LAIRD v. THE EAST INDIA COMPANY.

S. C. 2 Burr. 1216.

A bill payable to A. "or order," and indorsed personally to B.,

ACTION on two bills of exchange of 2000*l.* each, drawn by R. Clive on the East India Company, at three hundred and sixty-five days after date, payable to *R. Campbell or Order*.

Campbell indorsed one to Ogleby, "or order," the other to Ogleby, without adding the words *or order*. But at the trial, the words *or order* appeared upon the indorsement in another hand-writing. The East India Company accepted both bills (a). Ogleby then indorsed them to the plaintiffs, and soon after became insolvent. The Company then refused payment. The jury found a verdict for the plaintiffs on the *first bill, but for the defendants on the second; apprehending, that by the usage of merchants it was not assignable, without the words *or order* in Campbell the payee's indorsement.

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may be after-
wards indorsed
by B. to another.

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Morton moved for a new trial. 1st, Because the bill, being once negotiable, could not lose its negotiability, by Campbell's writing on it some words, and omitting others:—*Moore* and *Manning*, Com. 311; words "*or order*" being omitted in an indorsement, still the bill is payable to order, if so in the original draught:—*Acheson* and *Fountain*, 1 Str. 557, S. P.; *Evans* and *Cramlington*, Carth. 5, 2 Vent. 296, 309. 2d, On the footing of surprise; the plaintiff not being prepared to give evidence of the custom of merchants: And the evidence given by defendants, being not of facts, but merely of opinion. *Yates*, S. S.

Norton and *Wedderburn* shewed cause. 1st, That custom is the foundation of all bills of exchange; and the custom of merchants is matter of law, not of fact; so is properly evidenced by opinion. A payee or indorsee, when the draught or indorsement is general, is absolute owner of the bill; he is the purchaser of it; value received is implied. He may destroy its negotiability. If he indorses it with negative words, as to "*J. N. and nobody else*," will any man seriously contend, that it is payable to any one else? Will any man take it? And if putting negative words on it would have destroyed its negotiability, then omitting the words "*or order*" amounts to the same thing. It is an implied negative. Campbell might have indorsed it in blank, (i. e. by only writing his own name), and then I agree, that any one might have overwrote what he pleased upon it. The presumption in such case is, that he meant to make it of the greatest possible use to his indorsee. But having once put the terms of indorsement upon it, this destroys the other presumption. All subsequent indorsees take it under the new terms imposed upon it. It is now a naked authority to Ogleby, to receive the money. Such a special indorsement does not import value received; for Ogleby might only be agent or factor for the indorser. *Moore* and *Manning* is hardly law. It is contrary to the reason which arises from the case itself. For the reason of such *special indorsement in that case seems to have been, that the indorser was a creditor to the special indorsee. Had therefore the bill been pre-

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(a) "Wherever an act of Parliament authorizes a corporation to draw and accept bills, it must be taken to give the holder of those bills the same remedy against the body corporate, as the law

gives in other cases against any parties to a bill;" *per Cur.* in *Murray v. E. I. Comp.*, 5 B. & A. 210. And see more as to the East India Company in *Hume v. E. I. Comp.*, ante, 291.

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tested for non-payment, the indorsee had effects of the indorser's in his hands, sufficient to indemnify himself. But upon a general indorsement, the indorser might have been called upon, at a distance of time, by any subsequent indorsee, which might have been very inconvenient. 2. The footing of surprise, if true, is no ground for new trial. If this be allowed, new trials would be always moved for, whenever the losing party thinks he can mend his evidence.

Morton, in reply, insisted that the supposition of law is equally strong, that a special indorsee is a purchaser, as well as a general one. For he might have resorted to Campbell, as well as to Ogleby.

Where an indorsement is in blank, you may overwrite what you please.

LORD MANSFIELD, C. J.—There can be no dispute. Where the indorsement is in blank, there you may write over it whatever you please. And it has been permitted to be done even in Court (t). But for this there is no occasion. Every thing shall be intended upon such a blank indorsement. The point relied on at the trial for defendants was, that where a special indorsement was made to A. B., and the indorser omitted the words, “or order,” this was equivalent to the most restrictive indorsement. Many witnesses were examined by defendants to prove this usage (v); but it did not appear that in any one fact, the indorsee of such special indorsement ever lost the money by such omission. The evidence was only matter of opinion. I told the jury that upon the general law (laying usage out of the case) the indorsement carried the property to Ogleby; and that the negotiability was a consequence of the transfer. But if they found an established usage among merchants, that where the words “or order” were omitted, the bill was only negotiable on the credit of the indorsee, they should find for the defendants. If otherwise, or they were doubtful, then * either for the plaintiffs, or make a case of it. They found for the defendants on the bill in question; for the plaintiff on the other, concerning which there was no dispute.

Custom of merchants must be controlled by adjudged cases.

Now, upon the best consideration I have been able to give this matter, I am very clear of opinion, that, at the trial, I ought not to have admitted the evidence of usage. But the point of law is here settled: and, when once solemnly settled, no particular usage shall be admitted to weigh against it: This would send every thing to sea again. It is settled by two judgments in Westminster Hall, both of them agreeable to law and to convenience. The two cases I go upon are, *Moore* and *Manning* in Comyns, and *Acheson* and *Fountain* in Strange. These cases go upon a general proposition in law, that an indorsement to A. implies “or order,” and is negotiable. The main foundation is, to consider what the bill was in its origin. The present bill, in its original creation, was not a bare authority, but a negotiable draught. There are no restrictive words in it. And whatever carries the property, carries the power to

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(t) *Lucas v. Marsh*, Barnes, 453; *Lambert v. Oakes*, 1 Ld. Raym. 443, Salk.

127, S. C.

(v) *Camden v. Cowley*, post, 417.

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Surprise may be,
not must be, a
ground for a new
trial.

Where a new
trial shall be
without pay-
ment of costs.

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Qn. Whether a
negotiable bill
can by any
words of restric-
tion be rendered
not negotiable.

Custom of mer-
chants is the ge-
neral established
law; not any
special local cus-
tom.

assign it. It were absurd, if the merchant's opinion should prevail, that this is now converted into a personal authority. If it be such, and the indorsee dies, it could not go to his executors and administrators; in whom most clearly the property of the bill does vest. Upon this ground, that the point is settled both by King's Bench and Common Pleas, and well settled, I think there should be a new trial. Otherwise also, I should be of the same opinion. Certainly, the suggestion of surprise is not in all cases a reason for a new trial; but in particular cases, such as the present, it may be (u).—The question of costs is very peculiar. There is a verdict in part for the plaintiff, which already carries costs for him. But, for form's sake, we must set aside the whole verdict, which is usually done on payment of costs. But this will be giving defendants costs, which they could not otherwise have, merely because they have obtained an improper verdict. Therefore, I think, that under *these particular circumstances, the verdict should be set aside without costs.

DENNISON, J.—I am of the same opinion. If the words to A. B. *only* were inserted, I should think it would not be restrictive: at least it should be left to a jury. In *Rawlinson and Stone*, M. 20 Geo. 2 (w), an inland bill of exchange was drawn payable to A. or order, who indorsed it to B., without adding anything more. The question was, Whether there was such an interest in the executor of the assignee, as that he might assign it. The Court held, upon enquiry from merchants, that it might be indorsed thus: "C., executor or administrator of B." When a man says, "Pay to A.," the law says, it is "to A. or order." He then says, I intend it should not be so. What signifies what you intend? The law intends otherwise. Same opinion as to costs.

FOSTER, J.—I am of the same opinion. This is now the settled law, and ought not to have been left to a jury. People talk of the custom of merchants. This word *custom* is apt to mislead our ideas. The custom of merchants, so far as the law regards it, is the custom of England; and therefore Lord Coke calls it, very properly, the law-merchant. We should not confound general customs with special local customs. I think there should be no costs.

WILMOT, J.—There are two questions. Whether the law is fully settled, and upon what principles? It is certainly now settled, and upon these principles: The original contract between the drawer and payee, is, to pay to the payee and his assigns, and the assigns of such assigns, *in infinitum*. There is the same privity between the drawer and the last assignee, as the first. The first assigns over that *chose in action*, which, in its nature, and by the express permission of law, is assignable, with the same privileges and advantages, that it had when he received it. It might be a considerable question, whether a

(u) *Gist v. Mason*, 1 T. R. 84; *Vernon v. Hankey*, 2 T. R. 113; *Spong v. Hag*, post, 802.

(w) *Barnes*, 164, Willes, 559, in C. P.: confirmed on error in K. B. 3 Wils. 1; 2 Stra. 1260, S. C. by the name of *Robinson*.

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Opinion of mer-
chants is not
the custom of
merchants.

man can limit and modify the property or not, even by express words of restriction, so as to check its currency. By giving a bare authority, he may do it; as, "Pay to A., for my use;" But if he indorses it generally, I should have a great doubt; *supposing it purchased by a subsequent indorsee, for a valuable consideration (x). In the present case, I think assigning it to A. carries the property, with all its qualities. It implies a consideration to have been given. I have a note of *Acheson* and *Fountain*. Mr. *Wearg* then cited a case so determined in Common Pleas, probably that of *Moore* and *Manning*. Another case shews the liberality with which indorsements have been construed: Carth. 403 (y). The question was, whether indorsement to the order of A. will enable A. to maintain an action. Determined, that it will. If so, *a fortiori*, an indorsement to A. will enable him to indorse it. Custom of merchants is the general universal law. Facts must be reiterated to make such a custom. The opinion of merchants is nothing. Special custom of merchants has been controlled in a case, where an indorsor had divided a note, and indorsed it to several persons: Carth. 466, Salk. (s) Held, that the indorsor cannot vary the original contract, and split one note into twenty. Determined to be a void custom, though allowed to be the custom of merchants. Same opinion as to costs.

New trial was granted without payment of costs.

(e) As to indorsements, which restrict the negotiability, see *Sass v. Prescott*, 1 Atk. 249; *Ancher v. Bank of England*, 2 Doug. 637; *Potts v. Reed*, 6 Esp. 57. As long as the first indorsement continues blank, a bill or note, as against the payee, drawer, and acceptor, is assignable by mere delivery, notwithstanding it may have upon it subsequent full indorsements; *Smith v. Clarke*, Peake N. P. C. 295.—See *Bayley on Bills*, 48 (ed. 1813.)

(y) *Fisher v. Pomfret*.

(x) P. 65, *Hawkins v. Cardy*, 1 Lord Raym. 360, 12 Mod. 213, S. C. "Where the drawer of a bill has paid part, you may indorse it over for the residue; otherwise not, because it would subject him to variety of actions;" *per Gould, J.*, in *Jackson v. Kennion*, 2 Wils. 262; *Bacon v. Searles*, 1 H. Bl. 88. See also *Pierson v. Dunlop*, 2 Cowp. 571; *Walwyn v. St. Quintin*, 1 Bos. & P. 652; and *Bayley on Bills*, 51, 156 (ed. 1813).

THE KING v. BARKER and Others.

S. C. 3 Burr. 1285.

Mandamus the proper remedy to restore a curate to his chapel.

NORTON moved for a *mandamus* to the trustees of a meeting-house at Plymouth, to admit a teacher, one Mence; on a suggestion by affidavit, that he was elected under the deed of trust by the congregation, and refused admission; and cited *K. and Blower* (a), a late case in King's Bench, where a *mandamus* was granted, to restore a curate to a chapel in Staffordshire, who was nominated by the vicar and ousted: which *mandamus* is now at issue.

Per Cur.—We have considered of that case since, and are all clear, that this is the proper specific remedy, where a

(a) 2 Burr. 1043: The chapel was a donative, endowed with lands: *S. C.* cited 1 T. R. 399.

curate is ousted from a chapel to which he has a right. In such cases, a clergyman is not to be driven to his ejectionment.

Rule to shew cause.—[*S. C. post*, 352.]

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TONSON v. COLLINS.

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ACTION on the case, for selling certain books called the *Spectators*, printed without any licence or consent from the sole and true proprietors of the copy thereof, *vis.* the plaintiffs, to their injury and damage. On not guilty pleaded, the jury found a special verdict to the following effect.

Qn. Whether copy-right subsists in authors, as a valuable property, independent of the stat. 8 Ann.

"That the *Spectator* is an original composition, by natural born subjects resident in England, *vis.* Mr. Addison, Sir R. Steele, &c. first published *A. D.* 1711. That Jacob Tonson deceased, in 1712 purchased of the authors for a valuable consideration, the said work, to him and his assigns for ever. That the plaintiffs Jacob and Richard are his personal representatives and assigns. That old Jacob in his lifetime, and the plaintiffs since his death, have constantly printed and sold the said work as their property; and now have and always have had a sufficient number of books of the said work, exposed to sale at a reasonable price. That before the reign of Queen Anne, it was usual to purchase from authors the perpetual copy-right of their books, and to assign the same for valuable consideration, and to settle them in family settlements, for the provision of wives and children. That, to secure the enjoyment of said copy-right, the Stationers' Company have made several bye-laws; particularly one dated 17 August, 1681, and another, dated 14 May, 1694 (therein set forth), reciting and recognizing, in the strongest terms, the copy-right of authors and their assigns, and prohibiting any infraction of such right by members of their Company, under certain pecuniary penalties. That the said Jacob Tonson, deceased, complied with the conditions required by the said Company, to ascertain his right, by registering the said work as soon as he had purchased the copy. That the defendant, without licence of the plaintiffs, and knowing the said copy to have been purchased by said Jacob Tonson deceased, printed, published, and sold several copies of the same in April and May, 1759, whereby the plaintiffs were *damnified; but whether the defendant is liable in law to answer the damages, they are ignorant. But if the Court shall adjudge him liable, they find him guilty, damages 5*l.*; if otherwise, not guilty."

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Wedderburn, for the plaintiff.—The general question will turn on the right of the plaintiffs. For sufficient acts of the defendant are found, of infringing that right, if existing: which right, if any, must be a right of property at common law; for this case is quite out of the statute of Queen Anne (*a*). The

(a) An author has a property in an unpublished work, independent of the statute; *Southey v. Sherwood*, 2 Meriv. 435; *Macklin v. Richardson*, Ambli. 694.

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right of authors in general is now to be determined; not of any particular bookseller. From the industry of the author, a profit must arise to somebody: I contend it belongs to the author; and when I speak of the right of property, I mean in the profits of his book, not in the sentiments, style, &c. I shall endeavour to shew,—I. That this right is as well founded as any other right of property: II. That it is also recognized by the laws of England.—I. Property, according to Selden, Mar. Claus. is *jus utendi, fruendi, alienandi, &c.* Different originals are assigned of the right of property. All agree, that its final cause is to promote the industry of individuals. Property at first continued only as long as possession; then, was extended for life; then, was transmissible to representatives; lastly, was refined into the multiplicity of rights we now experience. According to Grotius, invention is one ground of property, occupancy another. The present ground is invention. While a work is in manuscript, the author has entire dominion over it. Courts have interposed, to stop its publication by other men. *Webb* and *Rose* (b); *Forester* (c) and *Walker* (d); late Case of Lord *Clarendon's* Manuscripts in Chancery (e). If, instead of copying by clerks, an author prints for the use of his friends, he gives them no right over the copies. Proceed one step farther: If he publishes by subscription, and no books are delivered but to subscribers; they have no right over the copies, but only to use them. This leads us to a general publication: There also every purchaser has a right to use, but nothing farther. The profits of the sale must go to somebody. The printer and other mechanic artists concerned in the impression are paid for their parts; the author who is the first mover ought in justice to be paid too. This doctrine is also consistent with public utility. Learning would be prejudiced, if authors may be stripped of this independent provision for themselves. It may be objected, 1st. That this right is incapable of possession.—Not more than advowsons and other incorporeal rights are. 2dly. It is impossible to be guarded.—Laws are the guard of property in society, not bolts and bars. This very action is a proof that it may be guarded.

II. This right is recognized by the laws of England. Manuscripts are quite out of the case. They could produce no profit. Therefore I shall begin from the introduction (f) of printing by Caxton in 1471, (for Dr. Middleton has confuted the story of its prior importation at the King's expence), and herein shall rely principally on Ames's *Typographical Antiquities*. Caxton's books were all printed at the expence of private persons. Pynson's and De Werde's, the same. There were then no profits, or but little, arising from the impression. About 1500, the encouragement arising from sale began to be suffi-

(b) Cited *post*, 330.

(c) *Forester v. Walker*, cited 2 Eden, 328.

(d) *Tonson v. Walker*, 4 Burr. 2325.

(e) *Duke of Queensberry v. Shebbeare*,

2 Eden, 329.

(f) See an account of the introduction of printing into this country, in 4 Burr. * 2418.

cient, without patronage. Since 1506, no books have been printed at the private expence of patrons. But now they began to be printed *cum privilegio ad imprimendum solum*. These privileges do not contradict the idea of a prior right of property; they only support and protect it. Henry 8th's book on the Sacraments was printed 1521, *cum privilegio*. This he gave the printers, in his private right as author. Another ancient book, called the Customs of London, having no certain author, has therefore no privilege. * About this time the Crown began to exert its prerogative copy-right (*g*); which shews, that a copy-right *may* exist. There was no King's printer by patent, till the reign of Edw. 6. He granted one to Grafton, with some exceptions, as of grammars; which were then the property of Barthelet, printer to Hen 8, being books composed at the King's expence. In Rym. XV, 150, there is a patent for printing Greek and Hebrew. This arose from the great expence of purchasing manuscripts. There could be no copy-right in classic books; therefore, the King seized them, as *bona nullius* and things *derelict*. These patents are most of them for Bibles, &c. which are things gained at the expence of the Crown, and therefore they are the subject of copy-right;—or for almanacks, &c. which are things *derelict* (*h*). One patent indeed goes out of this rule; that for printing law books. I cannot account for the principle upon which that is founded. Next came the power of licensing, which arose from the religious disputes then prevalent. This made printing be looked upon all over Europe as a matter of state, and proper to be regulated by law. In 1537, Hen. 8. published a proclamation against printing without licence. Fox, 572. In 1555, another, ordering the possessors of heretical books to burn them; else, to be accounted rebels, and executed by military law. The same King erected the Company of Stationers, professedly to regulate the press. His charter was confirmed by Queen Elizabeth in 1558. In 1556, a decree of the Star Chamber regulated the manner of printing, and number of presses. Ames, 534. In 1583, two printers, Wolf and Ward, insisted upon a right of printing all books, even where there were copy-rights existing; Stowe, 223, tit. Stationers' Company. But commissioners appointed by the Crown willed them to desist. In 1585, another decree of the Star Chamber, that no man should print books, whereof the property was in others, according to the allowed ordinances of the Stationers' Company. In 1583, several printers surrendered certain copy-rights, to the use of the poor of the Company of Stationers; reserving a power of printing them at the lowest rates; Ames, 551. This shews, that the * profits of publication were then usually assigned. Tottel had several copy-rights. This severity of the Star Chamber had no good end. Another decree of the Star Chamber was made in 1637, modelled on that of Qu. Eliz. During the ensuing usurpation,

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(g) See Sol. Gen. *Yorke's* argument, *ante*, 112, and notes.(h) But see *post*, 328.

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the same tyrannical powers were exerted. After the restoration, the statute of the 13 & 14 Car. 2 (i), was modelled on the Star Chamber decrees, and states, that many had the right solely to print, talks of the owner's consent, and gives a penalty in case of transgression, to the owners of books and copies. Though all these restrictions were founded on wrong principles of policy, yet they are strong arguments of a generally-allowed pre-existing copy-right. As to the law patent, (the best account of which is in the Case of *Roper and Streeter* (k), [and] in *Carter* (l), whatever validity it may have, it can have no effect on the present question. It confines the author of a law book to print with a particular person. It does not take away any copy-right (m). Few precedents to be met with in the books. *Ponder and Braddel*, 13 Car. 2, Lill. Entr. 67; action upon the property of the Pilgrim's Progress. What cases there are, are ill reported; being all on patent rights, and therefore the law printers would only print the arguments on one side. In 1 Mod. 256, property of almanacks are said to be the King's, first, because derelict; secondly, as prerogative copies, since they regulate the feasts of the Church.—The expiration of the licensing act of Car. 2, gave rise to the statute of Queen Anne (n); which recognizes authors as proprietors; and gives particular remedies by a penal action. It takes away no antecedent right. There is a saving clause of all antecedent rights. The words, "for fourteen years and no longer," extend only to the accumulative remedy by penal action. There have been many cases in Chancery, wherein injunctions have been granted, to restrain the sale of books, in prejudice to the proprietors of copy-rights. *Motte and Falkner* before *Talbot*, C. 1735 (o). —*Eyre and Walker*, coram *Talbot*, C. 1735 (p). —*Walshoe and Walker*, 1736, coram *Jekyll*, M. R. (q)—The Case of *Gay's* Works in 1737, where Lord Chancellor made *the injunction perpetual; which he could not have done merely under the act. *Austen and Cave*, 1739. In fine, this species of property is acknowledged by act of Parliament—Long understood to be vested, and made the subject of family settlements—recognized by the Court of Chancery. Therefore, we presume that a court of law will allow an action on the case to lie for its violation.

Thurlow, for the defendant—The right contended for, if it exists, must arise from either—1. Privilege; 2. Common law property. It supposes a right to multiply copies *in infinitum*; and to exclude other persons from making profit by multiplying them. Some parts of the verdict quite out of the case. It is of no consequence, whether the authors are natural born subjects or no; because this right of property, if any, is personal; and may be acquired by aliens.—Of no consequence *now*, that they

(i) C. 33. See *ante*, 111, n.

(k) Cited *post*, 328.

(l) Case of *Rolls's Abridgment*, *Carter*, 89; 5 Bac. Abr. p. 595; *S. C.* cited *ante*, 113; *S. C.* cited 10 Mod. 106.

(m) See *Baskett v. Cunningham*, *post*, 370.

(n) *Post*, 309, n. (i).

(o) Cited *post*, 331.

(p) *Id.*

(q) *Id.*

continued to publish it. If there be any property, they may use it as they please. It might have been an ingredient at the trial, by which to measure the damages. The case has not been argued as a right arising from privilege, or flowing from any act of the state. I shall therefore insist, I. That it does not exist naturally or flow from natural law: II. That where this kind of property has been spoken of by learned men, or even by Courts of justice, it had reference to the extraordinary acts of the state.

I. Public utility, &c. points one way as well as the other. It is useful to the public, that a monopoly should be abolished. The establishment of copy-right may tend to the advantage of authors; not of the public. When a perpetual monopoly is established, printers who purchase copies will print in the * vilest and the cheapest manner; which will make the curious resort to foreign countries. The act of Parliament therefore wisely gives a *limited* monopoly, and not a *perpetual*. Property in the profits of publication must presuppose property in the thing itself. And the subject of this property, if any, must be in the abstracted, ideal, incorporeal composition. Now, the idea of the composition, as it lies in the author's mind, before it is substantiated by reducing it into writing, has no one idea of property annexed to it. In the Roman law, there was a question concerning specification, long debated between the Proculi and Sabini. If I write any *Carmen*, &c. on the materials whereon Titius has wrote his *Carmen*, &c. before, it belongs to Titius, *jure specificationis*. Vide Institut. and Puffendorf on the subject (r); who observes, that this is not an *original* method of acquiring property, but merely by *contract*. See also Seld. Mare Claus. cap. 22. Publications by subscription shew, that there is a method, by which an author may gain a profit for his works, without resorting to any copy-right. I insist, that every subscriber has a right to do what he pleases with the book he has so subscribed for. It will be difficult to shew the remedy of such a right as this. Will the remedy lie against the keepers of circulating libraries, who buy one copy, and hire it to an hundred to read?—Or against a man who lends it gratis? Both gratify the curiosity of others, and stop the sale of the book. It will be difficult to confine this merely to books, and not extend it to other inventions. A learned author † has endeavoured at it, and brangled it, and made miserable stuff of it. He attempts a distinction between the labour of the head and of the hand. But in some machines the labour of the head is much greater than that of the hand. Sir Isaac Newton had no greater property in his Principia, than Lord Orrery had in his machine. If the labour of the head gives the right, the property is just the same. And it is possible, that the in*vention of a mouse-trap might cost its author the same labour of head that the orrery did its noble contriver. So that this ground of property depends entirely upon the dif-

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ference of heads. The right of property in books and machines is therefore the same. Both have arisen from

II. The extraordinary acts of the state. The licensing acts began in England in 1400 and odd. Before that no marks appear of property in books. St. Ambrose "De Vitis Patrum" appears, from Ames, to have been licensed by the archbishop. In Caius Coll. library at Cambridge, there are many books, in MS. as well as print, published under licence. From 1539, privileging and printing went hand in hand, printing being supposed a flower of the Crown. Indeed there are great arguments for supposing that printing was imported by the Crown. Lord Coke says so—And Polydore Virgil the same, in the reign of Henry 8th. Be this as it will, the privileges granted imply no idea whatsoever of copy-right in authors. They relate merely to printers, as if in nature of a patent for this new invention of publication. In 1551, licence granted to Laurentius Torrentinus to print the Pisan Code. Here was nothing new in the invention of the book: The encouragement is to the labour of printing. Qu. Eliz. granted a patent for the sole printing of music,—another for maps of England,—another for latin, &c.—All these patents are totally foreign to any notion of copy-right. They rather exclude it. The reasons of creating this exclusive property in printers were reasons of state. *Darey and Allen*, Moor, 673; the privilege for sole printing was held to be good, for the peace and safety of the realm. So in Holland, a theological controversy once ran so high, that the state enjoined the disputants to proceed no farther, lest they should offend *contra bonos mores*. At length it was provided, in 1556, that no one should print books without leave from the Company of Stationers. In 43 Eliz. among other complaints of monopolies, by the House of Commons, a monopoly of the translation of Tacitus was complained of; which shews very little regard to any *right of either authors or translators. The stat. 21 Jac. 1 (s), saves to the Crown the right of giving privileges in matters of printing: Which shews, that the property was supposed to be derived from the Crown. The word "property" in the statute of Queen Anne (z) arises from the wording of the orders of the Company of Stationers in 1691; who were fond enough of asserting such a right. This

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(s) C. 3, s. 10, concerning monopolies.

(z) 8 Ann. c. 19. But now by stat. 54 G. 3, c. 156, s. 4, it is enacted, that from and after the passing thereof, (June 29, 1814), the author of any book composed and not printed and published, or which shall thereafter be composed and be printed and published, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book for twenty-eight years, from the day of first publishing the same; and also, if the author shall be living at the end of that period, for the residue of his natural life: and by s. 8, that if the author of any book, which shall not have been published fourteen years at the

time of passing the act, shall be then living; and if he shall die before the expiration of the fourteen years, then the personal representative, or his assignee, shall have the sole right of printing and publishing for the further term of fourteen years, after the expiration of the first fourteen years: and by s. 9, if the author of any book then published shall be living at the end of twenty-eight years after the first publication, he shall, for the remainder of his life, have the sole right of printing and publishing the same. As to the construction of this statute, see *post*, 345, n. (d).

statute provides, that if the author overlives fourteen years, the property shall return to him: that is, it shall no longer remain in the printer, according to the orders of the Stationers' Company. Suppose now the author had assigned it for fifty years; I should contend, that the subject-matter of this assignment is, by the statute, made incapable of subsisting for more than fourteen years. By one clause in the statute of Queen Anne (*v*), certain great officers were enabled to regulate the prices of books; not only of those entered at Stationers' Hall, but of all others. This would not have been repealed, had the Legislature thought a property attached in authors exclusive of the terms in this statute. For it would be extremely inconvenient, if no power of regulation were vested any where. For then authors might set what price upon their works they pleased; since no action can lie against them for abusing their power. This is the first action ever known to be brought upon this head of property (for the declaration in Lilly's entries is the mere invention of the author); and therefore ought not to be received. Littleton, Chapter "Knight's Service," says, "No action can be brought upon the statute of Merton for disparaging an heir, because none ever had been brought." (*u*). "Diversity of Courts," says, "Writ of error will run to the five ports;" Brooke (*w*) says the like: But in Dyer, 376, because none ever had gone, it was determined none ever should go. Year-book, 39 Hen. 6, a royal protection to the King's proctor at Rome disallowed, because none ever granted before. The cases in Chancery are none of them opposite to this doctrine. The injunctions granted are all of them since the statute of Queen Anne, which clearly vests an absolute right in authors, &c. for fourteen years. In the late case of *Tonson and Walker*, about Newton's Edition of *Milton, Lord Chancellor did not determine upon the general right of property, but upon the statute. For Dr. Newton's notes were clearly within the term. However, an injunction in Chancery is not conclusive to the right. It is not that solemn adjudication which the law requires.

Wedderburn in reply.—The jurisdiction of the Court of Chancery, to grant injunction in these cases, well supported by the finding of the jury, that this is a customary property. The profits of authors, &c. must arise from an extensive sale. It is therefore their interest to publish books in the best and the cheapest manner. But if they did not, this is only *argumentum ab abusu*. If this right be abused, you may lay restrictions upon it, as was done by stat. 8 Ann. [c. 19, s. 4], though that clause is now repealed by 12 Geo. 2, [c. 36, s. 3]. Books cannot be compared to mechanical inventions, with any propriety: For those are capable of improvement at every copy made. Books are usually reprinted *verbatim*. We allow that reasons of state gave birth to exclusive patents; but deny that such patents gave original to or interfered with copy-rights.

(*v*) S. 4, *post*, 310.(*u*) Co. Litt. 2, 107, 80 a.(*w*) *Cinque Ports*, pl. 25.

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Patents were chiefly in favour of printers, being a new art which tended to diffuse knowledge. Learned men were originally rewarded by the emoluments they received from the resort of pupils. When their learning came to be diffused by books, society gave them this recompence instead of it; which we hope the Court will protect.

[*311] Lord MANSFIELD, C. J.—Let this case stand over for farther argument. There is no doubt, but the violation of that property, which may be the subject of an injunction in Chancery, will maintain an action on the case in this Court. Because every injunction proceeds upon the supposition of a legal property. There are two sorts of cases in the Court of Chancery, which I desire may be looked into; 1st, Where there hath been no printing or publication at all (x). The statute of Queen Anne seems evidently to distinguish this *from other cases. In the case of the edition of Pope's Letters to Swift, the question was, Whether the property was not transferred to the correspondent. Lord *Hardwicke* thought not, and that the writer was still the proprietor, and therefore granted an injunction against the assignee of Swift. 2d. Where the term given by act of Parliament has been clearly expired. I remember no case, where the merits have been fully argued, and the injunction made perpetual, at the hearing of the cause; therefore, they are not quite decisive; and yet they have great authority. They at least answer the objection against the disuse of these actions; since the parties injured have followed their remedy in another Court. In *Tonson* and *Walker*, Lord *Hardwicke* inclined to the property, but sent it to law. It was there twice argued, but never certified. The reason why he leant to the property was, because, in all prerogative causes of this kind, the counsel for the Crown had endeavoured (right or wrong) to put the merits on a supposed property in the Crown: and it seemed to be universally acknowledged, that such a property might be subsisting. Let the Judges be attended with copies of the cases in Chancery.

[S. C. post, 321.]

(x) *Ante*, 302, n. (a).

THE KING v. WHEELER.

S. C. 3 Burr. 1257, but not S. P.

AN attachment had issued against the defendant, for disobeying an award, and filing a bill in Chancery against the arbitrators, and he had been examined upon interrogatories.—The master's report upon interrogatories of contempt, cannot be moved for the last day of the Term, without previous leave of the Court; unless upon extraordinary circumstances. *Morton* moved for the master's report, upon the last day of the Term, without previous leave of the Court, upon an affidavit, that the defendant had made the proceedings on this very attachment the subject of a supplemental bill, and had moved for an injunction. Objection by *Howard*, that this motion was irregular. But, *per Cur.*—In a case so extraordinary as this,

the contempt being every day increasing, the Court will dispense with their rule.—However, it being then objected, that the defendant was not personally served with notice of this motion, *but only that it was put under his chamber door, the Court (for that reason only) refused the motion(y).

(y) See 1 Tidd's Pr. 518 (ed. 1821); *R. v. Edwards*, *post*, 637.

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SITTINGS AFTER TERM.—MIDDLESEX.

MORRIS v. HARWOOD and PUGH.

S. C. 3 Burr. 1241.

TROVER for a mare, which Pugh hired of the plaintiff, and sold to Harwood, the other defendant, on the 31st of March. The declaration was of Easter Term, which began the 8th of April: and no evidence was given of a demand from the plaintiff to Harwood, till the 9th of April; whereupon *Norton*, for the defendant, insisted on a nonsuit; there being no conversion till demand and refusal, as the mare still continued in the possession of the defendant. The plaintiff then proved, that the writ was not sued out or served till the 2d of May, long after the demand and refusal. Lord MANSFIELD at first inclined, that the detention before action brought, coupled with the demand and refusal after, amounted to a conversion *ab initio*. However, a verdict was taken for the plaintiff, subject to the opinion of B. R. whether the verdict should not, in respect of costs, be entered, as if it had been found for the defendant, the mare being agreed to be delivered immediately.

Qⁿ. If plaintiff can recover in trover, when the conversion is after the first day of the Term in which the declaration is delivered, though before the true time of suing out the writ.

N. B. It was agreed, if the plaintiff had declared on a special day in the Term; or had entered a memorandum on the roll, that the action was brought on such a day in the Term, it would have cured this defect.

[*S. C. post*, 330.]

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ROSS v. BRADSHAW.

ACTION on policy of insurance on the life of Sir James Ross, for one year, commencing 22d of October, 1759, with warranty from the insured, that Sir James's was then a good life. Sir James had received a wound, at the *battle of La Feldt in 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or fæces: which circumstance was not mentioned to the insurers at the time of the insurance. At eleven months' end, Sir James died of a malignant fever.

Concealment of circumstances on a life insurance not so fatal, [* 313] if the life be warranted good, as if it be a common insurance.

Lord MANSFIELD gave it in charge to the jury, that there was a distinction between a common insurance, and one with

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warranty. That the concealment of many circumstances will vitiate the first, which will not vitiate the second. Because in the second, the insured takes it upon him to prove, in case of death, that *cestuy que vie* was in a general good state of health. And it appearing by many witnesses, that the consequences of Sir James's wound were inconvenient only, and not dangerous to his life at the time of the insurance, the jury found a verdict for the plaintiff (s).

(z) This case is more fully reported in Marsh. Ins. 770 (ed. 1808), Park's Ins. 649 (ed. 1817). There Lord Mansfield is reported to have said—"Where an insurance is upon a representation, every material circumstance should be mentioned; such as age, way of life, &c. But where there is a warranty, then nothing need be told; but it must, in general, be proved, if litigated, that the life was in fact a good one: and so it may be, though he had a particular infirmity. The only question is, whether he was in a reasonably good state of health, and such a life as ought to be insured on common terms." So where a policy contained a warranty, that A. B. was in good health, when the policy was underwritten; and it appeared in evidence, that though he was troubled with spasms and cramps from violent fits of the gout, he was in as good a state of health when that policy was underwritten, as he had

enjoyed for a long time; Ld. Mansfield told the jury, that "such a warranty could never mean, that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." Verdict for the plaintiff; *Willes v. Poole*, Id. 771, Id. 650. If there be no warranty, the insurer takes the risk upon himself; *Stackpool v. Simon*, Marsh. Ins. 772, Park's Ins. 648. Stat. 14 G. 3, c. 48, provides, that no life insurance shall be made, where the insured has no interest; and that the insured shall not recover more than his interest. See *Tidswell v. Ankerstein*, Peake's N. P. C. [151]; *Godsall v. Boldero*, 9 East, 72. As to concealments in policies of insurance, see *Hodgson v. Richardson*, post, 463; *Carter v. Boehm*, post, 593.

BERENS v. RUCKER.

Insurers liable to pay the charge of a compromise bond *vide* made to prevent the ship from being condemned as lawful prize, or to avoid a greater expence.

ACTION on a policy of insurance, dated 21st July, 1758, on a Dutch ship called the Tyd, and its cargo, at and from St. Eustatius to Amsterdam;—warranted a Dutch ship and the goods Dutch property, and not laden in any French port in the West Indies. The cargo was worth 12,000*l.*, and was insured at fifteen guineas *per cent.*; for, though the common premium before the French war was but three guineas *per cent.*, yet it was thus advanced, by the number of captures, which the English had made of neutral vessels, on suspicion of illicit trade, and the detention of those vessels by the proceedings in the Courts of Admiralty. The defendant underwrote 82*l.* of the plaintiffs, for a premium of 12*l.* 18*s.* 34*d.*

In May, 1758, the ship was at St. Eustatius taking in her cargo, which consisted of sugar and indigo, and other French commodities, which were put on board her, partly out of barks from sea, partly from the shore of the island. The 18th of June, 1758, she sailed on her voyage: 27th of June was taken by an English privateer: 28th June was carried into Portsmouth. On the 1st of August, the sailors were examined upon the standing interrogatories, prescribed by stat. 29 G. 2, c. 34, and the captain entered his claim in the Admiralty Court.

[*314] *In October, 1758, the claimants were cited to specify, what

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part of the goods were taken from the shore of St. Eustatius, and what from the barks. Citation continued from Court to Court, till February, 1759. The 24th of February, 1759, interlocutory decree was pronounced for the contumacy of the claimants, in not specifying what parts of the cargo were so taken, and that therefore the goods should be presumed French property.

Appeal to Lords Commissioners of Prizes. Many causes stood before it. The market was very high. The cargo in part was perishable. Wherefore the agent of the owners agreed with the captors, to give them 800*l.* and costs, to obtain a reversal of the sentence. The reversal was had by consent; and in order to give costs to the captors, it was decreed by consent, that there was a sufficient cause for seizure; and thereupon costs were decreed to the captors; and restitution of the cargo to the owners was also ordered.

The ship, when restored, proceeded to Amsterdam, and arrived there the 11th of August, and the Chamber of Insurances in that city settled the average of the plaintiff, towards the loss and the expences, at 14*l.* 3*s.* 8*d.*, occasioned by the capture, detention, and litigation. And for this sum the action was brought.

LORD MANSFIELD.—The first question is, whether this was a just capture. Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust. The pretence was, that part of this cargo was put on board off St. Eustatius, out of barks, supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the Dutch shore, and then put on board afterwards; in which case there is no colour for seizure. The rule is, that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken. Not so, if she has only French produce on board, without taking it in at a French port: for it may be purchased of neutrals.—

*Second Question, Whether the owners have acted *bond fide* and uprightly, as men acting for themselves, and upon a reasonable footing; so as to make the expences of this compromise a loss to be borne by the insurers. The Judge of the Admiralty's order to specify was illegal; contrary to the marine law and the act of Parliament, which is only declaratory of the marine law. Because, if they had specified, it could be of no consequence, according to the rule I before mentioned. Yet the captors were however in possession of a sentence, though an unjust one. And a Court of appeal cannot, or seldom does, upon a reversal give costs or damages, which have accrued subsequent to the original sentence: For those damages arise from the fault of the judge, not of the parties. Under all these circumstances therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.* The appeal was ha-

Trading to a French port as an adopted ship makes a neutral ship lawful prize, not barely having French produce on board.

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zardous, the delay certain. Van de Poll, the Dutch deputy in England, negotiated the compromise. The Chamber of Commerce at Amsterdam ratified and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to, to avoid a total one.

Verdict for the plaintiff(a).

(a) This case seems to be the only one, in which this point has been expressly determined; but it was cited without contradiction in *Tyson v. Gurney*, 3 T. R. 479. By 33 G. 3, c. 66, s. 37, &c. (continued by 43 G. 3, c. 160, s. 33, &c.) all contracts to ransom vessels captured are declared absolutely void: and therefore, where, after

an illegal sentence of condemnation, the owner re-purchased his ship, which had been captured, it was held, that he could not recover the money so paid from the underwriter; *Havelock v. Rockwood*, 8 T. R. 268, where *Berens v. Rucker* is also cited.

STEVENSON v. SNOW.

S. C. 3 Burr. 1237.

Qⁿ. Whether any and what part of the premium on a policy of insurance must be returned, if the policy be given up and vacated?

THE ship the Earl of Loudon was underwrote at five guineas *per cent.* at and from London to Halifax in Nova Scotia, and warranted to depart *with convoy (b) for the voyage*, that is, *either the Halifax or Louisburgh convoy*. The convoy then lay at Spithead. The ship sailed to Spithead, and found the convoy was gone, and sailed to Plymouth after it, but missed it and completed her voyage without it. The insured, before any account came that the ship had sailed from Portsmouth, gave notice to the underwriter, delivered back the policy, and desired him, either to underwrite at the long premium (*i. e.* ten guineas *per cent.*; proviso, that if she departed with convoy, then that two guineas should be returned,) or to return back a proportionable part of the premium. The defendant, the underwriter, refused to do either; and the plaintiff brought this action, to recover back such proportionable part.

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*It was proved for the plaintiff, that it was usual to return in such cases a part of the premium, but not how much. And *Morton* cited *Stra.* 1265, to the same purpose. The premium from London to Portsmouth was then one and a half *per cent.*

Norton for the defendant, insisted, that this was one entire contract;—And that you shall not split it upon equitable grounds, according to the quantity of the risque run, which would be endless, after the voyage is once begun.

Lord MANSFIELD.—Policies of insurance are more governed by principles of equity, than any thing else. It has been usual, even where policies are vacated by fraud, to return part of the premium. How the law in that case would be, I will not determine till it comes before me. But so the fact stands, which is very strong. If it be right to make a return, we can easily

(b) It appears from the report in 3 Burr. "that it was warranted to depart with convoy from Portsmouth for the voyage; that when the ship arrived there, the con-

voy was gone:" and it seems the report in Burr. is more correct; see 3 Cowp. 669, and 3 Doug. 787.

settle the proportion, by the *quantum* of the premium then payable in voyages from London to Portsmouth.

Verdict for *3*l.* 10*s.**, subject to the opinion of King's Bench on the foregoing case, and this question—Whether the plaintiff is entitled to recover any thing, and what, against the defendant?

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[See post, 318, *S. C.*]

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GULLIVER v. WAGSTAFF.

RULE granted, and afterwards made absolute, that service of a declaration in ejectment, at the house of a tenant in possession, on a day *past*, might be good service; and that service of the first rule, at the house of the said tenant, should be good service (*a*). *Vide* Trin. 1 Geo. 3, Pag. 290.

Service of a declaration in ejectment at the house on a day past, made good service.

(*a*) *Douglass v. —*, 1 Str. 575; *Colless v. Dunch*, 2 Burr. 1116; *Tyrrrell v. Denn*, Id. 1181; *Buckle v. Roe*, 1 N. R. 293, *acc.* It must be shewn in the affidavit, on which the rule is moved for, that the deponent made diligent inquiry after the tenant, but was not able to find him, and

that he verily believes he has absconded and keeps out of the way, to avoid being served or arrested for debt; *Doe dem. Turlug v. Roe*, 1 Chit. R. 506. And see *Goodright dem. Waddington v. Thrustout*, post, 800.

SULSTON v. NORTON.

S. C. 3 Burr. 1235.

ACTION on the statute (*b*) for bribery at the late election for Tamworth;—Five counts in the declaration. Jury found a general verdict for the plaintiff. He took it on the first count only; *viz.* for corrupting one Moor, by giving him *5*l.* 10*s.** to vote for Lord Villiers and Sir Robert Burdett.

Caldecot moved for a new trial, on a suggestion, 1. That the person bribed did not vote for the candidate in whose behalf the bribe was given; therefore was not corrupted. 2. That Moor gave a note for the money; which it was agreed should be destroyed, in case he voted as desired, and a counter-note was given for that purpose. Therefore it was a *loan*, and not a *gift*; and the verdict should have been taken on the second count for a corrupt loan, and not on the first for a corrupt gift.

But *per* Lord MANSFIELD, C. J., FOSTER and WILMOT, Js. (*absente* DENNISON, J.) The first objection has been *already solemnly determined. "*Bush and Rawlins* (*c*), Trin. 29 Geo. 2, B. R. action for corrupting one Harvey, by giving him *2*l.**

Action for corrupt bribery will lie, though the person bribed does not vote according to the bribe. Bribery by loan is but colour and is really bribery by gift.

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(*b*) 2 G. 2, c. 24, s. 7.—See also, 18 G. 2, c. 18; 49 G. 3, c. 118; and *R. v. Pitt*, post, 380; *Combe v. Pitt*, post, 523; *Dick-*

son v. Fisher, post, 664; *Sutton v. Bishop*, post, 665.

(*c*) *Say. R.* 289.

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"to forbear giving his vote for Mr. Morton, at the Abingdon election preceding. It appeared on the trial, that Harvey did vote for Mr. Morton, notwithstanding the bribe, and always intended so to do. Verdict for plaintiff, and motion for a new trial. It was twice argued; and *Dennison, J.*, delivered the opinion of the Court, that this was within the statute; and cited *Philips* and *Fowler (d)*, P. 7 Geo. 2, C. B." And undoubtedly the offence of the corruptor is complete, notwithstanding the voter afterwards repents: As if one bribes a juror, and he afterwards gives a right verdict, that will not exculpate the offender.

As to the second objection: The loan and note is all colour and device: It is clearly a gift; and the verdict is rightly taken (e). But suppose it taken wrong, by mistake of the officer, or the counsel (for the jury were certainly not mistaken; they gave a general verdict)—Will the Court grant a new trial; unless, upon the whole, the verdict was contrary to justice? They would rather amend the record, by putting the verdict on the right count.

Rule discharged.

(d) Say. R. 291, and Willes, 425.

(e) So if I lay a wager of five guineas with A. that he does not vote for me, it is a bribe; *Anon. Loft*, 552. A wager between two voters, as to the event of an

election, is illegal; *Allen v. Hoarne*, 1 T. R. 56. A declaration stating, that "the defendant did receive a gift or reward," without specifying what he did receive, is bad; *Dasy v. Baker*, 4 Burr. 2471.

STEVENSON v. SNOW.

S. C. 3 Burr. 1237.

If an insurance be made on two distinct risks, and one of them is not run, insurer shall refund a rateable part of premium.

THIS case (*Vide Trin. Vacation last, Page 315*) was argued by

Wedderburn for the defendant.—This usage is no law; not the custom of merchants, but merely a voluntary usage.—The premium was paid upon a valuable consideration, which appears upon the face of the policy; and whether adequate or not, it is not the part of this Court to consider. The contract is one entire contract, and cannot by the rules of law be apportioned. The ship sailed from London to Portsmouth, at the risk of the insurer. There is no fault in the insurer. The insured warranted to depart with convoy, and departed without it. He shall not be admitted to say, "because I have broke my warranty, you shall return part of my premium, which you otherwise had a right to retain." Upon the principles of equity, the insurance was upon the particular voyage, and on the whole of that voyage. The insured shall not take the less hazardous part of the voyage upon himself, and throw the more hazardous upon the insurer. This would be substituting a different voyage instead of that contracted for. It has been determined, that if a ship sets out, and makes a deviation, or returns back, the whole premium belongs to the insurer. This is equal to the present case. The voyage was

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begun under the contract, and at Portsmouth the insured renounced it.

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Yates, for plaintiff.—The reason of the strictness of law with respect to the entirety of contracts, is, to prevent a multiplicity of actions upon the same contract. With respect to their operation, every day shews they are divisible, as in rents, &c., which may be apportioned. The insured intended to insure to Halifax. Will you make him pay the same premium for not going under insurance, as if he had gone? The warranty here is no covenant, but merely a condition. There is no contract upon which equity operates more efficaciously, than upon insurances. If an insurance is made to a mere broker, the *cestuy que trust* may bring his action. This case is directly within two foreign ordinances, Magens. I. 190.—II. 266.

Per Cur. Lord MANSFIELD, C. J.—I had not the least doubt at the trial, nor have now. These are contracts *de jure gentium*, and depend not on the legal import of the terms in the contract, but on mere equity. If the insurer runs no risk, he shall not have any premium. It has been determined, that if the insured departs wholly without convoy, having articleed to depart with, the whole premium shall be returned, because no risk is then begun. So in proportion. The reason is, because there is no consideration to found a contract upon. It is here endeavoured to be distinguished, because there is an inception of the voyage, and part of the risk is run. There is no force in that objection. Here are plainly two distinct parts of the contract, 1st, a voyage to Portsmouth, 2dly, from thence to Halifax. These were both *in the view of the parties. The second depended on a condition, that the ship should depart with convoy; which not being performed, the contract is at an end. It is just the same in reason, in case one part of the risk be not run, as if neither was. [*320]

DENNISON, J.—Same opinion. It is the most equitable construction in the world.

FOSTER, J.—Same opinion. There was no consideration for the remainder of the premium when no risk was run.

WILMOT, J.—Though this usage is not the custom of merchants, or strictly law merchant, yet it is a strong evidence of the equity of the thing. Where a risk is once begun, if it be one entire risk, the insured cannot recover back any part of the premium, whether the voyage be totally completed or no. But here are two distinct risks in the contemplation of the parties.

Per totam Curiam.—Let the *postea* be delivered to the plaintiff(f).

(f) See the observations on this case in *Rothwell v. Cooke*, 1 Bos. & P. 172: there it was held, that, on an insurance on a ship at and from Hull to Bilbao, warranted to depart from England with convoy, the voyages from Hull to Portsmouth,

where she meets with convoy, and from thence to Bilbao, may be considered as distinct; and in case of a loss between the two latter places (she sailing without proper convoy) an apportionment and return of premium may be demanded. These

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cases appear to have been so determined, on the ground of there being two distinct risks, viz. one from the port of lading to the place of joining convoy, the other from the latter place to the port of discharge. But where there is only one entire risk, the rule is, that when such risk has not commenced from any cause whatever, there the premium shall be returned: when it has once commenced, then there shall be no apportionment or return of premium. See *Tyrie v. Fletcher*, 2 Cowp. 666; *Bermon v. Woodridge*, 2 Doug. 781. So where a ship was insured for twelve months, at so much *per month*, the contract was considered to be entire for one whole year; and though she was lost at the end of two months, and the risk then ceased, it was held that there should be

no apportionment, nor return of premium; *Loraine v. Thomlinson*, 2 Doug. 585. On an insurance *at and from Jamaica* to L., warranted to sail before Aug. 1st, and the ship did not sail till September, whereby the insurers were discharged, and was then lost; it was held to be one entire risk, and that, as there could be no apportionment (in the absence of evidence of usage), the assured could recover no part of the premium on the voyage from Jamaica; *Meyer v. Gregson*, Park's Ins. 588 (ed. 1817); Marsh. Ins. 658 (ed. 1808), S. C. But in a similar case, there being evidence of such usage, the assured recovered back the premium, deducting one-half *per cent.* for the risk at Jamaica; *Long v. Allen*, Park's Ins. 589; Marsh. Ins. 660.

MORRIS v. HARWOOD and PUGH.

In trover, evidence may be given to shew the real time of suing out the writ, so as to avoid the relation to the first day of the Term.

THIS case (*Vide Trin. Vacation*, page 312,) came on to be argued. And *per* MANSFIELD, C. J., DENNISON and WILMOT, Js. (*absente* FOSTER, J.)—The only question is, whether a party at *Nisi prius* is to be precluded from going into the real merits of the case, by this legal fiction of relation. This is a matter which lies merely in evidence; which may be different from the case, where all lies upon the face of the record. In a prosecution on the game law, before *Wilmot*, J., on the western circuit, it appeared, that the writ was not sued out till after the time of limitation, though, by relation back to the first day of the Term, it would have been within the time; plaintiff nonsuited. We think there is no doubt, but that the *evidence of the real time of suing out the writ may be given in evidence (g).

Postea delivered to plaintiff.

N. B. As the judgment against Pugh was by *default*, it was a doubt whether Harwood could have had costs, even if the verdict had been found in his favour; as not being within the statute of Car. 2 (h).

(g) *Rhodes v. Gibbs*, 5 Esp. 163, *acc.* See *A. G. v. Brown*, Forrest, 110; *Price v. Hundred of Cheston*, 1 P. Wms. 437, and the note of Mr. Serj. Williams to the case of *Mellor v. Walker*, 2 Wms. Saund. 1, n. (1), where all the authorities on this point are collected; *Tidd's Pr.* 24, 165, 753, (7th ed.) and *Johnson v. Smith*, *ante*, 207, 215.

(h) See *Shrubb v. Barrett*, 2 H. Bl. 28; *Note v. Ingham*, 1 Wils. 89; *Day v. Hanks*, 3 T. R. 656. Where, in an action of trover, two of several defendants were acquitted on the trial, they were held not to be entitled to costs, under 8 & 9 W. 3, c. 9, s. 1, which gives costs to defendants acquitted in trespass; *Poole v. Boulton*, Barnes, 139 (8vo. ed.).

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TONSON v. COLLINS.

THIS case (*vide* Trin. 1 Geo. 3, page 301,) was again argued by *Blackstone*, for the plaintiff.

Qⁿ. Whether any copy-right exists in authors, independent of stat. 8 Anne.

The question is, whether the damage occasioned by the defendant is, or is not, accompanied with injury. If so, he is liable to answer that damage: if otherwise, not liable. All injury being a privation of right, this brings it to a question of right. I contend, that by law, (independent of stat. 8 Anne), "Every author hath in himself the sole exclusive right of multiplying the copies of his literary productions;" which right is, by assignment, now vested in the plaintiffs. I shall consider this right,—I. As founded in reason. And therein, 1st. The natural foundation and commencement of property; viz. by invention and labour. Both exerted in a literary production; the present work is found to be an *original composition*. *Original (ex vi termini)* implies invention; as *composition* does industry and labour. Property may with equal reason be acquired by *mental*, as by *bodily* labour. This, the exertion of *animal* faculties, and common both to us and the brute creation, in their nests, caves, &c.: that, the exertion of the *rational* powers, by which we are denominated Men; and which therefore have as fair a title to confer property, as the other. The right of occupancy is referred to this original, of *bodily* labour. Locke on Government, Part 2, c. 5, same right of occupancy in ideas, as in a field, a tree, or a stone. Both at first owing to good fortune: to casually lighting on a vacant possession, in the one; to a happy texture of the understanding, in the other. Both useless to the proprietor, unless cultivated and improved: neither liable to be taken from him, but by his own consent. 2dly. The end of establishing and protecting property; viz. its common utility to mankind. *Agriculture* and the *Arts* are supported by vesting a property in whatever a man's industry can produce. Without such a law, no man would build, plough or sow, weave, &c. *Science* equally encouraged by protecting the produce of genius and application. Without some advantage proposed, few would read, study, compose, or publish. This advantage can only arise from the profits of publication: and those profits can only be secured, by vesting in the author an exclusive right of publication. Universal law has established a permanent, perpetual property in *bodily* acquisitions: and reason requires, that the property in *mental* acquisitions should be equally permanent. 3dly. The one essential requisite of every subject of property is, that it must be a thing of *value*. Its value consists in its capacity of being exchanged for other valuable things; and if I can exchange it, it must be mine previous to the exchange: for, *nemo dat quod non habet*. Whatever therefore hath a *value* is the subject of property. For it would be absurd and unjust in any system of law, not to secure the enjoyment of that, by which (when lawfully acquired) a man may make a profit or advantage.

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And it matters not, whether that value be intrinsic, or merely capricious. A man hath a property in an ape or a popinjay, and trespass lies for taking them away: Bro. Trespass, pl. 407 (i). So, every literary composition hath a value; which is measured by the sale it obtains. Hoyle on Whist has been protected by the Court of Chancery, and considered as a saleable book; it is equally entitled to protection as Newton's Principia. Notwithstanding, therefore, Mr. *Thurlow's* assertion, I must maintain, that "A literary composition, as it lies in the author's mind, before it is substantiated by reducing it into "writing," has the essential requisites to make it the subject of property. While it thus lies dormant in the mind, it is absolutely in the power of the proprietor. He alone is entitled to the profits of communicating, or making it public. The first step to which is clothing our conceptions in words, the only means to communicate abstracted ideas. Ideas drawn from external objects may be communicated by external signs; but words only demonstrate the genuine operations of the intellect. These may be addressed either to the ear or the eye, by discourse or writing. The former, being the more obvious, is therefore the more ancient way. Orations, plays, poems, and even philosophical discourses, were usually communicated in this manner. And all ages have allotted to the composer the profits that arose from this mode of publication. The author was rewarded by the contributions of the audience, or the patronage of those illustrious persons, in whose houses they recited their works. The sale of copies, or a price paid for the liberty of rehearsing an author's works in public, are as old as the establishment of letters. Whoever contravened this right was esteemed no better than a robber. Terence sold his *Eunuch* to the *Ædiles*, and was afterwards charged with stealing his fable from Menander—" *Exclamant furem, non poetam, fabulam dedisse*" (k). He sold his *Hecyra* to Roscius, the player. Statius would have starved, had he not sold his tragedy of *Agave* to Paris, another player—" *Esurit, intactam Paridi nisi vendat Agaven*;" Juvenal (l). These sales were, and are founded upon natural justice. No man has a right to make a profit, by thus publishing the works of another, without the consent of the author. It would be converting to one's own emolument the fruits of another's labour. The next way of publication is by writing, or describing in characters, those words in which an author has clothed his ideas. Here the value which is stamped upon the writing arises merely from

(i) See also 4 Burr. 2344; 12 H. 8, 3.

(k) Prologus ad *Eunuchum*. Terence was not accused of having stolen his Comedy from Menander, but from *Nævius* and *Plautus*. The passage is as follows:—

"Exclamat, furem, non poetam, fabulam Dedisse, et illi dedisse verborum tamen: Colacem esse Nævi, et Plauti veterem fabulam, Parnetti personam inde ablatam et militis."

Terence in his defence says:—

"Colax Menandri est: in ea est parastus Colax, Et miles gloriofus: eas se non negat Personas transulisse in *Eunuchum* suum Ex Græcâ: sed eas fabulas factas prius Latinas scisse sese, id vero pernegat. Denique Nullum est jam dictum, quod non dictum sit prius."

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the matter it conveys. Characters are but the signs of words, and words are the vehicle of sentiments. The sentiment therefore is the thing of value, from which *the profit must arise. Consider writing, 1st, As an assistant to the memory; 2dly, As a means of conveying sentiment to distant times and places. In neither of these lights does the writer relinquish his title of making profit by his works; except that, when he has once written and published, he gives up the exclusive privilege of reciting to the ear; since, by parting with his manuscript, he has constituted a substitute in his stead, which speaks perpetually to the eyes of every reader. But, though he has given out one or a hundred copies, has constituted one or a hundred substitutes to speak for him, yet no man has a right to multiply those copies, to make a thousand substitutes instead of one; especially, if any gain is to arise from such multiplication. The Roman law of Accession, Inst. 2, 1, 33 (hinted at in the former argument), was founded on very absurd principles. If one wrote a poem on another man's paper, the poem belonged to the owner of the paper, and not to the poet. Surely, a satisfaction for the paper was all that the owner was entitled to. The same law, in the same breath, gives testimony to its own unreasonableness. If a picture be painted upon my tablet, it belongs to the painter. For it is ridiculous (says the emperor) that the painting of an Apelles or a Parrhasius should follow the property of a worthless board. Certainly, there is as little reason, that the works of a Bacon or a Milton should become the property of the stationer, upon whose paper they might casually be written. But, absurd as this law is, it is not absurd enough to say, that the owner of the paper acquired any more than a right to that identical copy. It never supposed, that he acquired a right to the sentiment, so as to multiply copies. For, this being the usual way of rewarding the labour of an author, it would be unjust to make him a sharer in the reward, who has been no sharer in the labour. It is the only species of property whereof authors are usually possessed; and it would be doubly hard, to take from them their only means of subsistence. Printing is no other than an art of speedily transcribing. What therefore holds with respect to manuscripts is equally true of printing. If an author has an exclusive property in *his own composition, while it lies in the mind,—when clothed in words,—when reduced to writing;—he still retains the sole right of multiplying the copies, when it is committed to the press. The purchaser of each individual volume has a right over that which he has purchased; but no right to make new books, and gain perhaps 500*l.* at the original expence of only five shillings. This answers Mr. *Thurlow's* question concerning the *extent* of the present remedy. "Does it lie against the keepers of circulating libraries, who buy "one book, and lend it to a hundred to read?" Certainly not. The purchaser of a single book may make any use he pleases of it; but no man, without leave from the author, has the right of making *new* books, by multiplying copies of the old. If a

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man has an opera ticket, he may lend it to as many friends as he pleases; but he may not counterfeit the impression, and forge others. The owner of a single guinea may barter it, or lend it, as he pleases; but he may not copy the die, and coin another.

It is necessary to sift this right to the bottom, and to argue on principles, as it probably will be a leading precedent; and it is more satisfactory, first to convince by reason, than merely to silence by authority; when we consider this right, in the next place,

[*326] II. As supported by law. It will previously be necessary to obviate Mr. *Thurlow's* objection, that, because no action was ever brought in a Court of law for the invasion of this right, therefore none will ever lie. The observation (if true) rather shews, that no man ever had the hardiness before to invade this right, than that this Court is unable to give a remedy. There is no right without a legal remedy to protect it from invasion. The comprehensive remedy of an action on the case, founded on equitable principles, is every day applied in peculiar cases of fraud and wrong, none of which (in circumstances exactly similar) *perhaps ever existed before. The wise provision of the statute of West. 2, c. 24, for the writ *in casu consimili* is founded upon the same principles, and is a full answer to this objection, at the same time that it is one of the glories of the English law. But the short and plain answer is this; that the parties aggrieved have usually pursued their remedy in a Court of equity, which occasions the scarcity of precedents in this Court. But unless equity be contradictory, instead of supplemental, to law, there is no doubt, but that every violation of property, which is a ground for an injunction, is a ground also for an action on the case; because the injunction presupposes, and proceeds upon, a legal property in the plaintiff. In all the cases cited by Mr. *Thurlow* there had neither been legal action nor suit in equity.

Under this head of argument, I shall, 1st, shew, that this species of property exists by the common law, and has been recognized, not only by the Crown, but also by several acts of Parliament. The Jury have found, "that, before the reign of Queen Anne, it was *usual* to purchase from authors perpetual copy-rights, to assign them, and to make them the subject of family settlements." And they find two orders of the Stationers' Company, 1681, and 1690, which state the same to have been then the antient usage. And when the existence of a custom is found by a Jury, and that custom is neither unreasonable nor inconvenient; that custom I take to be part of the common law. To go still higher than the verdict: *Tottell's Patent for Law Books*, 20 Jan. 1 Eliz. (not printed in Ames, but among Mr. Bagford's manuscripts in the British Museum), "No person shall imprint any books, out of any written copy, which he the said Richard Tottell or his assigns had, or should attain unto, or buy at any other man's hand." This shews the antiquity of purchasing copy-rights.

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A. D. 1588, several printers had assigned to the Company of Stationers their copy-rights in several books, for the benefit *of the poor. Ames, 551. By stat. 1649, cap. 60, Scobel. 92, this grant is confirmed, and a right of ownership strongly recognized in books that belonged to individuals, as well as the Company in general. After the Restoration, the Licensing Act, 13 & 14 Car. 2, c. 33, in several parts of it (ss. 2, 3, 5, and 23), protects copy-rights, which it speaks of, as existing prior to the act. These laws therefore do not *create* the right, but *guard* it by additional and cumulative penalties. This statute was continued for short terms of years, till 9th of May, 1679, 31 Car. 2, and was then suffered to expire; till revived by stat. 1 Jac. 2, c. 17, *A. D.* 1685.—7th October, 21 Car. 2, *A. D.* 1669, a patent was granted to Seymour for forty-one years, to print almanacks and prognostications, “ whose originals he could purchase or obtain from the respective authors thereof, during the said term.”—(Bagford’s MSS.) This shews an acknowledged copy-right in authors, which might be sold, and did not depend on the statute of Car. 2, which was shortly to expire; but during Seymour’s whole term, which extended to 1710. Arguments of the same nature might be drawn from the stat. 8 Ann. c. 19; but s. 9 (which declares, “ that nothing therein shall prejudice, or confirm any copy-rights in any person whatsoever”), precludes the use of any arguments from thence, on either side of the present question. 2dly, I insist, that whenever any causes, relating to privileges of printing derived from the Crown, have been brought before the Courts of common law, they have generally been argued and determined on the footing of a property in the copy, supposed to exist in the Crown (*m*). And if the Crown is capable of a copy-right, the subject is equally capable. *Stationers’ Company* and the *Law Patentees*, for printing Rolle’s Abridgment, in the House of Lords, M. 18 Car. 2, Carter, 89 (*n*). This was argued on the footing of a prerogative copy-right in the Crown, over all law books. It was urged, *that the laws [328] are the King’s laws; that the King pays the Judges who pronounce the law, and formerly the reporters of the year-books; and adjudged for the patentees. I do not enter into the goodness of these reasons; but it appears to have been admitted on both sides, as a *datum* or first principle, that a copy-right might subsist at common law, and then they endeavoured, on the part of the patentees, to vest the present right in the Crown. *Roper* and *Streater*, M. 22 Car. 2, Common Pleas; cited in *Skin*n. 234, and alluded to 1 Mod. 257 (*o*). *Roper* printed 3d Cro. Reports, by assignment from Croke’s executor. *Streater*, the law patentee, printed upon him. *Roper* brought action of debt on the statute of Car. 2.—Adjudged for the plaintiff in Common Pleas, but reversed in Parliament.—Said (in *Skin*ner) that this statute did not give the right, but only the action

(*m*) See *ante*, 119, n. (*o*).(*n*) Cited *ante*, 113 & 305, n. (*l*).(*o*) Cited also 2 Show. 260, 10 Mod. 106; *S. C.* 5 Bac. Ab. p. 595.

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of debt. Therefore, it was a cumulative remedy. If the judgment in Common Pleas was right, that went on a copy-right in the executors; if the judgment in the Lords' House was law, that went (like the case of Rolfe's Abridgment) upon a prior copy-right in the Crown.—*Stationers' Company* and *Seymour*, for printing almanacks, Trin. 29 Car. 2, Common Pleas, 1 Mod. 257, 3 Keb. 792, Serjeant *Pemberton* argued it, on the footing of a general copy-right in the Crown. Nothing absurd in this supposition. The regulation of time has been always a matter of state. Roman *Fasts* were under the care of the Pontifical College. Romulus, Numa, and Julius Cæsar, successively regulated the Roman calendar. The Court gave judgment for the plaintiffs—1. Because almanacks have no certain author, and therefore the property (as in things derelict) devolves to the Crown. 2. Because they are substantially only part of the Liturgy; and they said, that “Adding prognostications to the calendar does not alter the case; any more than if a man should *claim a property in another man's copy*, “by reason of some inconsiderable additions of his own (*p*).—Earl of *Yarmouth* and *Darrel*, P. 1 Jac. 2, King's Bench, 3 Mod. 75, for printing blank bonds, in opposition to the *plaintiff's patent;—argued merely as a copy-right in the Crown, as being things without a legal owner. The Court inclined, the patent was not good; but it seems to have been admitted, that a copy-right might subsist in a proper subject, though this was not so.—*Stationers' Company* and *Partridge*, M. 11 Ann. King's Bench, 10 Mod. 105, Serjeant *Hussey's MSS. S. C. (q)* Issue out of Chancery, on the validity of a patent for almanacks. Argued on the footing of a copy-right. No opinion: but the Court said, “Monopolies were odious; therefore this case must be distinguished, by deriving to the Crown some special interest in almanacks.” Hence I may infer, that the Court thought, that a special interest might subsist in the copy of any given book.—*Baskett* and the *University of Cambridge*, M. 32 Geo. 2, King's Bench (*r*); Case out of Chancery, for printing an abridgment of statutes: certificate for the defendants: it is our misfortune, that the reasons are not given, upon which the Judges certify. But it is fresh in every one's memory, that the very learned argument delivered on the part of the defendants, was entirely built upon a supposed copy-right of the Crown in acts of Parliament.

[Lord *Mansfield*.—“The Court considered it as a prerogative copy-right. The Crown has no right over books in general; therefore the patents could have no effect, unless by a special right derived from the King's prerogative.”]

3dly, Consider the cases out of Chancery; in which I shall confine myself to those that stand clear of the statute of Queen Anne. All compared with the register.—*Knaplock* and *Curl*,

(p) But see *Stationers' Company v. Curran*, post, 1004.

(q) Cited at length in 4 Burr. 2402.

(r) *Ante*, 105, 2 Burr. 661, S. C.; cited also 4 Burr. 2404.

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9th November, 1722, *coram Macclesfield*, Chancellor; Viner (tit. Books, 3): for printing Prideaux's Directions to Churchwardens: books ordered to be damasked, and a perpetual injunction awarded. Hence it appears, that Lord *Macclesfield* (who sate in Parliament 8 Ann.) did not look upon the right to depend merely on the statute of Queen Anne; *for he then would have ordered a *temporary*, not a *perpetual* [*330] injunction.

[*Foster, J.*—"This was a legal right, clearly within the act of Parliament."]

I mention it only, because here the injunction was *perpetual*. [Lord *Mansfield*.—"Is there any instance of a temporary injunction upon a decree?" "It was plainly upon the act of Parliament; for the books were ordered to be damasked. "The Court could not have ordered this, unless under the statute. It was going pretty far, for a Court of equity to "proceed upon the penalty. They have never done it since."]

Tonson and Clifton, 11 December, 1722, *coram Macclesfield*, Chancellor, for printing *The Conscious Lovers*: injunction granted, and acquiesced under. The book not stated to have been registered at Stationers' Hall; which is requisite by the statute of Queen Anne. It must therefore have proceeded on the general common law right.

[Lord *Mansfield*.—"No: it was always held, that the "entry in Stationers' Hall was only necessary, to enable the "party to bring his action for the penalty. But the property "is given absolutely to the author, at least during the term. "Whether the act implies any larger property, is another "question. But the most judicious way in Chancery is, not to "insist upon the penalty, nor of course on the entry, but to "pray an injunction to protect the general property."]

Webb and Rose, 24th May, 1732, *coram Jekyll*, Master of the Rolls (s), for printing the Draughts of Webb the Father's Conveyances. Decree, that the Draughts should be delivered up, and the injunction continued. This could not be within the act; it was never published; and the term given by the act commences from publication. It therefore turned on *the original and natural right which every man has in his [*331] own compositions.

Eyre and Walker, 9 June, 1735, *coram Jekyll*, Master of the Rolls (t), for printing *The whole Duty of Man*. This was first published *A. D.* 1657, therefore clearly not within the statute; injunction acquiesced in.

Motte and Falkner, 28th November, 1735, *coram Talbot*, Chancellor (v), for printing *Swift's and Pope's Miscellanies*. Some of these pieces published in 1701, others in 1702 and 1708. The term of the statute clearly expired as to them. Yet an injunction granted for the whole, and acquiesced in.

[Lord *Mansfield*.—"It was argued on that objection; particularly as to the predictions in 1708."]

(s) Cited 4 Burr. 2330.

(t) Cited 4 Burr. 2325, 2353.

(v) Cited *ibid.*

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Waltheof and Walker, 27 January, 1736, *coram Jekyll*, Master of the Rolls (u), for printing Nelson's Festivals; published in 1704. Injunction granted and acquiesced in.

Tonson and Walker, 12th May, 1739, *coram Hardwicke*, Chancellor (w), for printing Milton's *Paradise Lost*; first printed, A. D. 1667.

[Lord Mansfield.—"That case was solemnly argued on a "special day appointed."]

That was upon a different invasion. The solemn argument was in 1752. *Pope and Curl*, 5th June, 1741, *coram Hardwicke*, Chancellor (x), for printing Pope's Letters to Swift. This the case of an unpublished manuscript, like *Webb* and *Rose* (y). Indeed it goes much farther. If, in any case, an author parts with his property by publication, the writer of a letter seems to have consigned his to his correspondent. These were published with the connivance, at least, if not under the direction, of Dr. Swift.

[*332] * [Lord Mansfield.—"Certainly not. Dr. Swift disclaimed "it, and was extremely angry. The only question was, whether the property was in Pope, who filed the bill, or in Swift, "who was no party to the suit."]

Mr. Pope seems to hint his suspicions of his friend (x). But

(u) Cited 4 Burr. 2325, 2353.

(w) *Ibid.*

(z) *Id.* 2330, 2397, 2 Atk. 342.

(y) *Southey v. Sherwood*, 2 Meriv. 435, ante, 302, n. (a).

(x) "One of the passages of Pope's life, which seems to deserve some inquiry, was a publication of letters between him and many of his friends, which falling into the hands of Curll, a rapacious bookseller, of no good fame, were by him printed and sold. This volume, containing some letters from noblemen, Pope incited a prosecution against him in the House of Lords for a breach of privilege, and attended himself to stimulate the resentment of his friends. Curll appeared at the bar, and, knowing himself in no great danger, spoke of Pope with very little reverence: 'he has,' said Curll, 'a knack at versifying, but in prose I think myself a match for him.' When the orders of the House were examined, none of them appeared to have been infringed: Curll went away triumphant, and Pope was left to seek some other remedy.

"Curll's account was, that one evening a man in a clergyman's gown, but with a lawyer's band, brought and offered for sale a number of printed volumes, which he found to be Pope's Epistolary Correspondence; that he asked no name, and was told none, but gave the price demanded, and thought himself authorised to use his purchase to his own advantage.

"That Curll gave a true account of the transaction, it is reasonable to believe, because no falsehood was ever detected; and

when, some years afterwards, I mentioned it to Lintot, the son of Bernard, he declared his opinion to be, that Pope knew better than any body else how Curll obtained the copies, because another parcel was at the same time sent to himself, for which no price had ever been demanded, as he made known his resolution not to pay a porter, and consequently not to deal with a nameless agent.

"Such care had been taken to make them public, that they were sent at once to two booksellers; to Curll, who was likely to seize them as a prey; and to Lintot, who might be expected to give Pope information of the seeming injury. Lintot, I believe, did nothing; and Curll did what was expected. That to make them public was the only reason, may be reasonably supposed, because the numbers, offered to sale by the private messenger, showed that the hope of gain could not have been the motive of the impression.

"It seems that Pope, being desirous of printing his letters, and not knowing how to do, without imputation of vanity, what has in this country been done very rarely, contrived an appearance of compulsion; that, when he could complain that his letters were surreptitiously published, he might decently and defensively publish them himself."—Johnson's Life of Pope.

In the preface to the first genuine edition, Pope says,—"If what is here offered to the reader shall happen in any degree to please him, the thanks are not due to the author, but partly to his friends and partly to his enemies; it was wholly

it was allowed that a property did subsist in the writer; for the injunction was granted and acquiesced in.

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Tonson and Walker (second case), 30th April, 1752, *Hardwicke*, Chancellor (a), for printing Milton's Works, with Newton's Notes. This was upon solemn argument for dissolving the injunction; Lord Chancellor continued it till the hearing, and the defendant gave it up. The injunction was penned in the disjunctive; to restrain the defendant from printing "Milton's Poem, or the Life of Milton, or Dr. Newton's Notes." The two former were quite clear of the statute.

[*Lord Mansfield*.—"The order was carefully penned and perused by Lord *Hardwicke* after it was drawn up."]

Duke of *Queensbury* and *Shebbeare*, 31st July, 1758, *coram Henley*, Keeper (b), for printing Lord Clarendon's Life. This another case of an unpublished manuscript. Lord Keeper, upon solemn argument, continued the injunction to the hearing. This was finally acquiesced under. I allow, that these cases in Chancery are not quite decisive, as few of them are upon a final decree. But they shew the uniform opinion of that Court, that a copy-right may, and does subsist, independent of the statute of Queen Anne.—This is farther supported by the opinion of the Courts of law, both Bar and Bench, in their mode of arguing and determining the cases of privileged printers.—This right has been recognized two centuries ago, and often since, by letters patent and acts of Parliament.—It is found by the jury to have been a uniform and ancient usage.—It is founded on the principles of reason, universal justice, public convenience and private property. *If established generally, it must have existed in the authors of the *Spectator*, under whom it is derived to the plaintiffs. Its invasion is an injury as well as a damage; and therefore ought to be answered by the defendant.

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Yates, for the defendant.—The right contended for by the plaintiffs is inconsistent with our laws and constitution; and clashes with every species of property known in this kingdom. The question is, Whether the plaintiff has, or has not, any legal property in the book before us? I agree, that the faculties of the mind may give a property as well as those of the body: But this, and every other kind of property, may be rendered common by the act of the proprietor. I allow, that the author has a property in his sentiments till he publishes them. He may keep them in his closet; he may give them away; if stolen from him, he has a remedy; he may sell them to a bookseller, and give him a title to publish them. But from the moment of publication, they are thrown into a state of univer-

owing to the affection of the former, that so many letters, of which he never kept copies, were preserved; and to the malice of the latter, that they were produced in this manner." It is hoped the reader will excuse the length of this note; as it was

thought it might be amusing to see the different accounts of the transaction.

(a) Cited 4 Burr. 2325, 2353. And see *Cary v. Longman*, 1 East, 358.

(b) 2 Eden, 329; cited 4 Burr. 2330, 2397.

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sal communion. I shall argue this, I. Upon general principles of property. II. Upon the local law of this kingdom.

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I. It is no species of property upon general principles; because, 1st, It is incapable of separate and exclusive enjoyment. All property implies possession. Bynkershock says, it begins and ends with manual possession. It is the *jus utendi, et fruendi*. And though actual possession is not always necessary, yet potential possession is. There must be *potentia possidendi*. The subject of property must be something susceptible of possession. Puffendorf (book 4), lays it down as essential to property, that it must be, 1. Useful; 2. Under the power of man, so as to fasten on it. *How is the property of the plaintiffs invaded in the present instance? The original MS. is not, nor ever was, in the hands of the defendants. The books sold are not, nor ever were, the property of the plaintiffs. The paper and ink belonged to the defendants. All the plaintiffs can claim is, the ideas which the books communicate. These, when published, the world is as fully in possession of as the author was before. From the moment of publication, the author could never confine them to his own enjoyment. It is begging the question to say, that the law will protect what is acquired by the labour of an author. An act of Parliament may create such a right. The statute of Qu. Anne has done it for a limited time. But no such property arises from the principles of common law; because that acts only upon subjects, where there is a possibility of separate and exclusive enjoyment. The plaintiffs can claim no right to the profits made by the defendant, because they accrued in the way of his trade. Their property, if any, is only in the incorporeal ideas, and not in the profits, to which another man applies them. If he may lend, or repeat them to others, why may he not as well communicate them in a type of his own? The business of a printer is a lawful trade, and where there is no property, but what merely subsists in idea, no man can be guilty of a private wrong by merely following his trade. 2dly, There are no *indicia*, or marks of appropriation to ascertain the owner of this species of property. What are the marks? It is not in manual occupation; it is not in visible possession, which Lord Kayms (Hist. of Property) lays down as an essential condition of property. How is an author to be distinguished? Some few may be known by their style; but the generality are not known at all. The act of publication has thrown down all distinction, and made the work common to every body; like land thrown into the highway, it is become a gift to the public. Is the title-page a mark of appropriation? No; that is often lost or omitted, and yet a purchaser of the book has as good a title to it, without a title-page, as with it. It cannot therefore be distinguished. The Legislature, by the statute of Queen Anne, supplied this defect, by directing an entry of the book in the registry of the Stationers' Company. But in a claim like the

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present, independent of the act, this defect still remains: it wants one necessary quality to make it legal property.

II. It is no species of property recognized by the local law of the kingdom. As to the usage stated by the verdict, there is no customary property known to our law, but what has been so time immemorial. This is not so found. It is impossible it should be, since the art of printing is itself within time of memory. It is stated, that it has been usual to assign, &c. this species of property. So the good-will of a shop is every day sold for a valuable consideration: yet that does not make it property.

[Lord Mansfield.—“ There are many decrees which make “ these things assets. I remember one with regard to the “ title of the St. James’s Evening Post. The buyer was “ quieted in the possession of it, and nobody else permitted to “ set it up.”]

The by-laws of the Company are private regulations among themselves, and cannot establish a new law for the kingdom in general. But the very requisite of an entry in the books, to make a copy become property, shews it was not so by any original right. In the former arguments, the patents to printers were relied upon, and chiefly cited from Ames’s Typographical Antiquities. But these were merely *privileges*, which excludes the idea of a *right*. They are to printers, not to authors, as a reward for their mechanic ingenuity. They are all for terms of years. Why this limitation, if the authors had a permanent and perpetual right in themselves? These patents were most of them illegal, and void upon the face of them; and your lordship will not draw any part of the law from so polluted a fountain. *I agree with Lord Bacon, that the King has an undoubted prerogative to confine the printing of certain things,—statutes—liturgies—almanacks as calendars, and settled as such by the Council of Nice. But in the present case, neither patent nor prerogative has any thing to do. It stands upon the right at common law. Use was also made of some Star-chamber decrees. These were professedly intended to correct some offences of the press; and no argument to affect the law of private property can be drawn from thence. Most of these monopolies were destroyed by stat. 21 Jac. 1, c. 3, which Lord Coke has given the history of, in 2 Inst. Next came the ordinances of Parliament against malignant papers published by the Royalists. They were copied from the Star-chamber decrees, and liable to the same observations. Stat. 13 Car. 2, was of the same tendency. Its scope was merely political. The words in it, which imply a right of printing to be vested in particular persons, may be satisfied, by applying them to the patentees of the Bible, &c. who had an undoubted right. Blank indentures are specially mentioned: they, I fancy, will hardly be ranked among original compositions. I hope, I am not precluded from arguing from the stat. 8th of Qu. Anne, from which Mr. *Blackstone* says some arguments might be drawn on his side of the question. I know it has

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been said, that this statute is merely declaratory of the common law; that it is only an accumulative remedy (c); that authors are in terms called the proprietors; and that publishing, without their consent, is treated as unlawful and injurious; and therefore, that a general common law property is strongly implied by the act. But the least attention will shew the direct contrary. Where is the accumulative remedy? It consists merely in damasking the paper. This revenge is all that is given to the author; the pecuniary penalty is given to others:

- [*337] Its title is, An Act for Encouragement * of Learning (*i. e.* by giving some new advantages unknown before, described thus) by *vesting* the copies in authors, &c. It was not therefore vested before. The limitation of time is a still farther proof of the same: it commences at a future day; it endures for fourteen years; if the author be living, the right returns to him for fourteen years more. Why only for fourteen? Why not to his representatives, as well as himself? An entry in the register is necessary to vest the right. Why this ceremony, if the author's right was inherent? There are also negative words, that the privilege shall endure for fourteen years *and no longer*. This alone might determine the merits of the case. As to injunctions out of Chancery, it is not a consequence, that whatever that Court prohibits is actionable at law. If tenant for life, *sans* waste, is cutting down trees in an avenue, Equity will enjoin him, but no action would lie against him at common law.

[Lord *Mansfield*.—"If the injunction be well founded, the same determination would be at law. If the waste committed be a species of destruction, not within the meaning of the parties who made the settlement or will under which he claims to be punishable for waste, a remedy would lie at law. Lord *Couper* went upon this ground when the tenant for life of Raby Castle, *sans* waste, endeavoured to pull down the castle itself."]

I wish the arms of this Court were always long enough to reach every case, without the aid of a Court of equity. All the Chancery cases cited are subsequent to the statute of Queen Anne.

- [*338] [Lord *Mansfield*.—"Where the date of the book is evidently within the statute, there the Court seems to have proceeded upon the right of property created by that act. But Mr. *Blackstone* has argued, 1st. That it cannot be so, where the term of the act is clearly expired: there they evidently go upon the original right. 2dly. That the same may be observed, where the copy has never been published, but surreptitiously got from the owner."]

As to those cases where the term is expired, the injunctions are only granted till answer; there is no final decree. As to unpublished manuscripts, I admit, that the property does continue in the author till publication; till he emancipates it, and

(c) See the judgment of Lord *Kenyon* in *Beckford v. Hood*, 7 T. R. 627; *Chapman v. Pickersgill*, 2 Wils. 145.

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makes it common. The piratical printer is here guilty of a double wrong:—in publishing private manuscripts without the leave of the owner; and in anticipating the profits of the first publication, to which, I acknowledge that the author is entitled. What species of property is this that is now contended for? Not real, certainly. Is it personal? It is not a *chose* in possession; it is neither material nor visible. It is not a *chose in action*, for those are not assignable, and this is insisted to have been usually assigned. It is merely a right of publishing ideas; and under what denomination of property that can fall, unless the Legislature will give it one, I cannot comprehend. Is this a contract between the public and the author, that none but he shall print these ideas? No: the public is not a corporation capable of contracting. There is no mutuality in the contract. The public cannot compel the author to furnish a sufficient number of copies. It has been said, that if the author neglects to print, it is an abandonment. How shall this neglect be ascertained? When will the property cease? What are the marks of dereliction? There can be none, any more than of appropriation. Who can seize or occupy it when relinquished? It is incapable of possession, and therefore is no personal chattel. It should be something that may be seen, felt, given, delivered, lost, or stolen, in order to constitute the subject of property.

[Lord Mansfield.—“How would you steal an option, or ‘the next turn of an advowson?’”]

* I say, if the property contended for be in action, the plaintiffs, as assignees, cannot claim it; if in possession, it must bear the marks of visible possession, and must have the qualities of other personal property. Will trover, detinue, trespass or replevin, lie for it? Can it be forfeited for treason or felony? How will you seize or transfer it? It does not lie merely in grant. Nothing can be granted, but where a man has an actual or potential property. One cannot grant all the wool that shall grow upon sheep, which he intends to buy. So one cannot grant the profits of a future edition of a book. Lord Coke says, a possibility cannot be granted; what is a more bare possibility than the profits of an author? Patents for new inventions are similar to the present case. They are allowed as temporary privileges, but the very grants are a proof, that, independent of them, the grantees could have had no monopoly. Patents of perpetual duration are injurious to the subject, and contrary to *Magna Carta*. *Darcy and Allen*, Noy. 182. A patent for the sole use of a new invention is good, provided it be for a time certain; because in that time, the invention may become common, and others have the skill to use it; *Cloth-workers of Ipswich's Case*, Godb. 254: Same reason given in *Mitchell and Reynalds*, 1 P. Wms. 183.

[Lord Mansfield.—“That is but a weak reason. Patents ‘are a guard rather against those who know how to use the ‘trade, than those who do not.’”]

Since then no permanent privilege is allowed to the inventor

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of an art, or a mechanical engine, what pretence have literary productions to a greater right? Both are the productions of genius, both require labour and study, and both, by publication, become equally common to the world. The Legislature seems to have judged so. The stat. 21 Jac. 1, against monopolies allows patents for new inventions; twenty-one years for such as were then in being, fourteen for new ones. *Stat. 8 Ann. allows twenty-one years to books already printed, fourteen to future publications. The statute of James provides against raising the prices of manufactures, that of Anne gave power to the Archbishop and others, to settle the price of books.

[Lord Mansfield.—“The statute of King James expressly “provides, that it shall not extend to books.”]

On the whole, neither on the general principles of property, nor on the local law of the kingdom, can this claim be supported. I wish all due encouragement to ingenious authors, consistent with the principles of law, and the rights of the subject. But if their claim tends to a monopoly, is contrary to the provisions of the Legislature, or the good of the community; if it introduces any change or novelty into the common law, they must excuse me. *Nolumus leges Angliæ mutare* is [the] language of *Magna Carta*. I trust, that the law, in this, as in all other cases, will be preserved entire by this Court. The author can claim no privilege, by common law: Let him resort to, and avail himself of that temporary indulgence, which the statute has thought proper to allow him.

[*341] *Blackstone* in reply—The principal pillar of Mr. *Yates's* argument rests upon his description of property. He considers it as having nothing for its subject, but what is substantial, palpable and visible. He has omitted the distinction between corporeal and incorporeal rights; the latter of which are as much considered by the law, as the basis of property, as the former. Your lordship gave an instance in options; the same may be said of advowsons, commons, ways, &c. The right of presenting to a church is not more visible or material, than the right of publishing a book. All these are mere *potential* rights, dormant and unnoticed, till opportunity calls them into *act*; and then they produce a visible fruit, by presenting a clerk, by travelling on the way, by turning cattle into the common, and, *in the present case, by publishing the book. The profits of a common are as uncertain, and as much a mere possibility, as those arising from a publication. They depend on the season, the weather, and an hundred other accidents. But is a right of common therefore, incapable to be granted? If not, why should the present incorporeal right, which is not less substantial than the former? It is asserted, that the bare act of publication renders the performance common to all mankind: It was asserted; but the proof of that position, if given, totally escaped my observation. He allows, that to constitute an abandonment, there must be plain tokens of a voluntary dereliction: In the present instance, it is so far from a dereliction,

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that the very act of publication shews an intention to continue the use of it, for the purpose of profit, so long as the author can. The argument drawn from circulating libraries was before considered. As for the profits which the defendant has made in the way of his trade, we claim them not; this is not a bill for an account, but an action for disturbing us, in making that profit in the way of our trade, which we say we have a right to do. *Sic utere jure tuo, ut alienum non lædas.* He says, a book, when published, is a gift to the public, like land thrown into a highway. It may be so, where the author conceals himself, and gives no *indicia* to distinguish his property. The title, the utterance, the vending, are sufficient *indicia* here. In such a case, it is more like making a way through a man's own private grounds, which he may stop at pleasure; he may give out a number of keys, by publishing a number of copies; but no man, who receives a key, has thereby a right to forge others, and sell them to other people. The usage of copy-right is called in question, because not shewn to be immemorial. There is no other way to prove an immemorial usage, but by tracing facts back to the earliest times, and seeing if it has ever been otherwise. We have *shewn it for two centuries back; there is nothing that contradicts it, and the law will then suppose it immemorial. But printing itself is within time of memory. True, but the art of writing is certainly immemorial. They are both different modes of the same thing; the substantial part is the describing a sentiment in characters. It is matter of indifference, whether a man prints 100 copies, or employs 100 amanuenses to write them. Mr. Yates has gone through the patents of privileged printers, to prove them illegal. I agree with him, they were; the only use I made of them, was to shew, that, whenever supported, they were supported only on the supposition of a prerogative copy-right; which shews, that such right is not merely ideal. He allows, that the King has a copy-right in some books; why then is the existence of a subject's copy-right in others, a thing so absurd and shocking to the principles of common law? Why then, he asks, were patents granted for fourteen years, if the author had before a perpetual property? I answer, they were additional guards to that property, by giving an accumulative remedy for a term of years. A new remedy will not destroy an ancient right. As to the statute of Qu. Anne, which has been laid open very accurately, I decline meddling with it at all, for the reasons I gave before. He has treated the present claim in the light of a monopoly; a very odious term. But what is a monopoly? An endeavour to appropriate to private use what before belonged to all the world in common. Like the sole printing of Latin books, law books, &c. every man has a natural right to print in that language, or that science.—But who can have a right to print another's composition (in any tongue or any science) before he pleases to publish it?—And, after it is public, who but himself can have a right to make a profit by re-printing it? The profit must arise from his sen-

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timent, from the matter contained in the book. It arises not *in the way of trade, by the bare manufacture of printing; for the paper when printed on, abstracted from the learning contained in it, is rendered less valuable than before. It is therefore no argument to say, that an author is not bound to supply copies to the public; for which reason another man may. What right has the public to demand them? The author has the sole right; he may set on them what value he pleases, as every man may do upon his own performances, whether divine, lawyer, physician, or author. Yet all will be blameable, if they set too high a value on their labours, and will feel the bad effects of it. It has been endeavoured to compare intellectual inventions with such as are merely mechanical. They bear no comparison, as has been successfully shewn in a pamphlet referred to in the last argument; and which deserves better treatment than Mr. *Thurlow* then gave it. ("A Letter from an Author to a Member of Parliament, by Dr. Warburton.") I shall add one or two remarks to his learned observations. Style and sentiment are the essentials of a literary composition. These alone constitute its identity. The paper and print are merely accidents, which serve as vehicles to convey that style and sentiment to a distance. Every duplicate therefore of a work, whether ten or ten thousand, if it conveys the same style and sentiment, is the same identical work, which was produced by the author's invention and labour. But a duplicate of a mechanic engine is, at best, but a resemblance of the other, and a resemblance can never be the same identical thing. It must be composed of different materials, and will be more or less perfect in the workmanship. Although therefore the inventor of a machine may not be injured at common law, by the sale of a work made like his, it will not follow, that an author is not injured by the surreptitious sale of a work that is absolutely and specifically his own. The proprietors of the *Spectator* were not injured by the sale of the *Rambler*, &c. which resembled their composition; but we say, they are now injured [*344] by the sale of the *Spectator* itself. *There is a distinction, then, in the nature of the things compared together; and there is also a distinction arising from public convenience. Mechanical inventions tend to the improvement of arts and manufactures, which employ the bulk of the people: therefore they ought to be cheap and numerous: every man should be at liberty to copy and imitate them at pleasure, which may tend to farther improvements. However, a temporary privilege may be indulged to the inventor for a limited time, by the positive act of the State, by way of reward for his ingenuity. This inconvenience will soon be over, and then the world will remain at its natural liberty. But as to science, the case is different. That can, and ought to be, only the employment of a few. And one printing-house will furnish more books, than any nation can find able readers; which differs it still more from the case of mechanisms, of which very few in comparison can be constructed under the inspection of the author. But sup:

posing, after all, that there was no real distinction between literary and mechanical compositions, yet the conclusion drawn from this argument is very illogical and unjust. If it be reasonable to allow a property in a literary production (and I submit it is highly so), can we argue thus? Books and machines are of the same nature: no property is allowed in a machine: therefore none should be allowed in a book. The argument would rather stand thus: Books and machines are of the same nature: property should be allowed in books; and therefore, it should also be allowed in machines. But since they are of natures very different, both arguments will fall to the ground.—The defects of this reply will be amply supplied on the next argument; and in the end, we still hope for judgment for the plaintiffs.

LORD MANSFIELD, C. J.—This question is a very general one, and has never yet been finally determined; though a fair argument will arise from Sir *Joseph Jekyll's*, Lords *Macclesfield's*, *Talbot's*, and *Hardwicke's* *proceedings, that they [*345] thought there was a property in the author at common law: else they would not have granted the injunctions that have been cited. But even in the case of *Newton's Milton*, Lord *Hardwicke* gave no opinion to bind himself, but continued the injunction to the hearing, following the example of Lord *Hardcourt*, in *Stationers' Company and Partridge*, who, conceiving great doubts concerning the Company's right, continued the injunction to the hearing; and, at the hearing, ordered a case to be stated for the opinion of this Court. It was twice argued here, but no certificate was ever made. In *Milton's Case*, Lord *Hardwicke* said, that if, at the hearing, he should consider the point as doubtful, he would send it to law to be argued; and, therefore, would give no opinion, so as to bind himself. However, the inclination of his opinion was, that there might be a common law property, not taken away by the statute of Queen Anne. What he grounded himself upon, were the cases at common law, relating to prerogative copy-rights. It must have been a copy-right in the Crown, though printing is within time of memory, that produced this prerogative property. I do not know, that, even in equity, there has been any case finally and solemnly determined, at the hearing.—When this came before me, I was determined, it should be argued and adjudged in the most solemn manner. And therefore, I refused to make a case of it, but directed a special verdict. As perhaps the parties may acquiesce under the decision of this Court, I should be desirous to have it argued before all the Judges. Let it stand over for further argument, before all the Twelve Judges (d).

(d) "After these two arguments, the case was adjourned into the Exchequer Chamber. I have been informed from the best authority, that so far as the Court had formed an opinion, they all inclined to the plaintiff. But as they suspected

that the action was brought by collusion; and a nominal defendant set up, in order to obtain a judgment, which might be a precedent against third persons; and that therefore a judgment in favour of the plaintiff would certainly have been acqui-

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oosed in; upon this suspicion, and because the Court inclined to the plaintiff, it was ordered to be heard before all the Judges. Afterwards, upon certain information received by the Judges, 'that the whole was a collusion, and that the defendant was nominal only, and the whole expence paid by the plaintiff,'—they refused to proceed in the cause; though it had been argued *bond fide*, and very ably, by the counsel, who appeared for the defendant. They thought this contrivance to get a collusive judgment was an attempt of a dangerous example, and therefore to be discouraged." *Per Willes, J.*, 4 Burr. 2327.

The same question was again elaborately discussed in a case respecting the sale of Thomson's Seasons, *Millar v. Taylor*; which is reported at great length in 4 Burr. 2303. There it was decided by Lord Mansfield, C. J., *Aston, J.*, and *Willes, J.* (*Yates, J.*, dissent.), that authors have by common law a sole and exclusive copy-right in *perpetuity*: see a short note of that case *post*, 675; see also *Osborne v. Donaldson*, 2 Eden, 327. The case of *Millar v. Taylor*, however, was soon afterwards overruled by a decision in the House of Lords. One Beckett had purchased the copy-right of Thomson's Works from Millar's executors, and filed a bill in 1774 against the Donaldsons, who had published some part of them, to account for the profits, and to restrain them by injunction from publishing the same in future. The Donaldsons, in their answer, said, they believed that Millar did not become entitled to the copy-right for a longer time than the several terms limited by 8 Ann. The works had been originally published in 1729, and the 28 years expired in 1757. Lord Bathurst, C., decreed a perpetual injunction, and an account. Against this decree the Donaldsons appealed to D. P., where it was reversed, a majority of the Judges, (*viz. Eyre, Nares, Perrott, Gould, Adams, and De Grey*, against *Ashurst, Blackstone, Willes, Aston, and Parker*), being of opinion against the perpetuity or common law right, and thereby establishing, that the exclusive right of authors is confined to the times limited by the act of Parliament: *Donald-*

son v. Beckett, 7 Bro. P. C. 88, or 2 Bro. P. C. 129 (Tomlin's ed.), 4 Burr. 2408, S. C.—See the observations of Ld. Kenyon in *Beckford v. Hood*, 7 T. R. 620: where it was held, that the property being vested in authors for certain periods, the common law remedy for a violation of it attaches within the times limited by 8 Ann.; and therefore an action on the case for damages may be maintained where a work has been pirated, although it has not been entered at Stationers' Hall, and was originally published without the author's name; and that the penalties thereby given are only an *accumulative* remedy. See also *Thompson v. Symonds*, 5 T. R. 41; *Cary v. Longman*, 1 East, 358, and notes; *Rosworth v. Wilkes*, 1 Camp. 94; *Barfield v. Nicholson*, 2 Sim. & St. 1. So a musical composition is protected by 8 Ann.; *Back v. Longman*, 2 Cowp. 623; *Clementi v. Goulding*, 11 East, 244, 2 Camp. 25; *Power v. Walker*, 3 M. & S. 7; *Clementi v. Walker*, 2 B. & C. 861. But the representation of a drama, *altered and abridged* from the original, without the consent of the owner of the copy-right, will not make the manager of the theatre where it is represented liable to an action; *Murray v. Elliston*, 5 B. & A. 657, 1 D. & R. 299.

Literary property is now protected by 54 Geo. 3, c. 156, which see, *ante*, 309, n. (f). Upon the construction of that statute, it has been decided, that though the words of it are, "that the author of any book, which shall hereafter be *printed* and published," &c.; yet that printing is not a condition precedent, and that the author, who in that case had previously sold several thousand copies in manuscript, had not thereby lost the benefit conferred by that act; *White v. Geroch*, 2 B. & A. 298. In the case of Mr. Hargrave's notes to Co. Litt., it was decided, that an author, whose works had been published more than 28 years before the passing of that act, was not entitled to the copy-right for life; *Brooke v. Clarke*, 1 B. & A. 396.

See also *Basket v. Cunningham*, *post*, 370; 5 Bac. Abr. *Prerogative* (F) 5, pa. 594; 4 Vin. Abr. Books, and Supplement, *ibid*.

[WRIGHT] Lessee of CLYMER, v. LITTLER.

S. C. 3 Burr. 1244.

Confession of
forgery by a
dead witness
may be admis-
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ON ejectment, a verdict for the plaintiff. Norton moved for a new trial. The plaintiff claimed a copyhold estate at Barnes in Surry, of the nature of borough English (e), under a will of Mr. Clymer, *deceased, made in 1743. Defendant claimed

(e) See *Roe v. Aistrop*, *post*, 1228.

under the heir-at-law, by an instrument dated 20 September, 1745, all of one William Medlycott's writing, not sealed, nor stamped, but subscribed by Mr. Clymer, beginning thus—"Know all men by these presents," whereby in consideration of natural affection, he *covenants and agrees* (but with nobody) that the lands in question shall *go and be given* to his wife for life, and then to Elizabeth, wife of said William Medlycott (she being also his heir-at-law), and her heirs for ever. It is attested by William Medlycott and Elizabeth Mitchell. It appoints no executor, and makes no disposition of his personal estate; and is indorsed, in Medlycott's hand, "Mr. Clymer's covenant and agreement." Mr. Clymer died about sixteen years ago; Medlycott took possession in right of his wife, and upon his death-bed, in 1746, declared to his sister Mrs. Victor, that the instrument of 1745 was forged by himself, and produced, from under the bed-clothes, the will of 1743, which till then was concealed by him; and sent it to the lessor of the plaintiff, who proved it in 1751. Since which, there have been three or four purchasers of the estate under Medlycott's title, which now is vested in the defendant. At the Surry assizes, upon this evidence and inspection of the two wills, *Willes*, C. J., directed the Jury, and they found the instrument of 1745 to be a forgery; and verdict for the plaintiff.

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sible evidence.
A void deed of
covenant is no
will, nor can
enure as a re-
vocation of a
former will.

Norton insisted, that this hearsay evidence was inadmissible, or at least inconclusive: especially as against purchasers for a valuable consideration. If so, the writing stands unimpeached; and the next question will be, to what purposes it will enure. 1st, It will enure as a will of copyhold lands (*f*), those not being within the statute of frauds. Any writing declaratory of the testator's intention is a will of lands. 2dly, It will be sufficient to appoint the uses of the surrender to the use of Mr. Clymer's will. Any writing is sufficient for that purpose. And then the defendant is in, under that surrender.—

*3dly, It is at least a revocation of the former will of 1743. [*347]
Revocations are always favoured both in law and equity, being in nature of a restitution to the heir. Revocations often happen where the party did *not* intend it. *A fortiori*, it shall happen by this instrument, which (though informal and incomplete) plainly shews the intent of the parties. Feoffment without livery, bargain and sale without enrolment, grant without attornment, are all of them ineffectual acts, yet will operate as revocations.

E. Harvey, for the plaintiff.—New trials are not usually granted upon ejectments, because the party may bring another. Lessor was a minor at the death of the testator; has been at sea and in low circumstances since. This evidence, though hearsay, was admissible and conclusive; for Medlycott (if living) might have been admitted to have proved the fact at the trial; or, if he had endeavoured to establish the instrument, the present witness, Mrs. Victor, might have been examined,

(*f*) See *Roe v. Heyhoe*, *post*, 1114.

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to have proved this confession against him. As to the legal question, 1st, It is no will, because there is no *animus testandi*. 2dly, It is not a sufficient appointment of a copyhold, because it is no will; to which only the surrender was made. 3dly, It is not a revocation. Revocations are not favoured in equity, unless they amount to a conveyance, on valuable consideration: 3 Mod. 258, *Egleston* and *Speke*; 1 Roll. Abr. 615, pl. 3, no covenant can revoke a will: This writing is at best but a covenant: 2 P. Wms. 623, *Layer's Case*.

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R. Leigh, same side.—The defendant is not a purchaser without notice. Every purchase has been since the proving of the will. The instrument of 1745 is neither will nor testamentary appointment; it implies no such thing; it imports only to be a covenant. *It is not a revocation, because, 1st, it is not so in express words; nor, 2dly, is it a new will; nor, 3dly, (the only remaining method of revocation) is it any disposition of Mr. Clymer's interest inconsistent with the former subsisting will. It is merely a covenant or promise. It was argued, that incomplete conveyances may revoke a will: But that must be, where there is an inception, some inchoate act, which may afterwards be made perfect. The present is a perfect act or nothing. If the instrument be of any import, still no new trial should be granted. This is no common hearsay. Dying declarations weigh as much as oaths: They will even convict of murder (g). No objection was taken to the evidence at the trial; the fact came out by cross-examination of the plaintiff's witness. 12 Ann., *Lucas*, 202(h), waiver of any point by counsel is conclusive upon the party; 2 Geo. 2, *Fitzg.* 40, *accord*.

Lord MANSFIELD, C. J.—It has been said, that in ejectment the Court will not readily grant a new trial (i). It is true, where a verdict has been given for the defendant; but where the plaintiff has obtained a verdict, it is a great difference to the defendant whether he has a new trial, or is forced to become plaintiff on a new ejectment. Ejectments are substituted in the place of real actions, in which the title appeared upon the pleadings, and gave no room for surprise. We should therefore rather lean to new trials on behalf of defendants, in the case of ejectments, especially on the footing of surprise. Another good rule for granting or refusing new trials, is, that,

(g) *R. v. Reason & Tranter*, 1 Stra. 499, 6 Hargr. St. Tr. 202, 205. *Woodcock's Ca.*, 1 Leach, C. C. 500; *Bambridge's Ca.*, 9 Hargr. St. Tr. 161, *acc.* But it must be proved that the deceased was *in articulo mortis*; which is a question for the Judge and not for the jury; *John's Ca.*, 1 East, P. C. 357; *Welborn's Ca.*, *Id.* 359. So the dying declarations of an accomplice are evidence, *Tinkler's Ca.*, 1 East, P. C. 354, 356; but not of a criminal at the time of execution, for, being a felon convict, he is incompetent; *Drummond's Ca.*, 1 Leach, C. C. 337,

1 East, P. C. 353, n. Dying declarations are only admissible, where the death is the subject of the charge, and the circumstances of the death the subject of the declaration; *R. v. Mead*, 2 B. & C. 605, 4 D. & R. 120.

(A) Or 10 Mod. Reg. v. *Helston Corporation*.

(i) See *Smith* dem. *Dormer v. Parkhurst*, 2 Stra. 1105, and *Goodtitle* dem. *Alexander v. Clayton*, 4 Burr. 2224: in the latter case a new trial was allowed; *Doe* dem. *Foster v. Williams*, 2 Cowp. 621.

upon the whole, substantial justice has not been, or has been, done to the parties.

In the present case, there is no objection to the will of 1743, but from the instrument of 1745. I will consider it, 1, In point of law; 2, In point of fact. 1. There is no colour to consider it as a will. The testator knew how to make one but two years before. In form *it has nothing testamentary. Had there been a single circumstance (even a mention of funeral charges) to have shewn it intended as a will, I agree that there are no formal words necessary to make it testamentary. It is now in the nature of a deed, though not sealed. Medlycott intended it as a covenant; which, if well drawn, he knew to be irrevocable.—If no will, it cannot operate as an appointment of uses, the estate being surrendered to the use of a will.—Revocations arise generally from the intent of the testator; therefore where he intends a complete conveyance, and dies before it is perfected, as feoffment *sans* livery, &c. it is a good revocation; he having demonstrated his intent to alter his former disposition. Other revocations arise from artificial reasoning of law; as by suffering a recovery, feoffment to one's own use, &c. wherein it has been held, that parting with the estate for these purposes amounts to a revocation. It might perhaps as reasonably have been otherwise determined; but so it has been, and so it must remain. However, covenants have never been allowed to be revocations; unless where the covenantee has a right to a specific performance. This is merely a covenant without such a right, and therefore can be no revocation.

2. As to the fact, the admissibility or competence of evidence must result from the particular circumstances of the case. No rule can be general. Here the testator died in 1746. Both wills [were] in the custody of Medlycott: The other subscribing witness [is] dead: His wife [is] to be benefited under it. He, on his death-bed, sends the lessor of the plaintiff his title; which is inconsistent with that under which the defendant claims. Under all these circumstances, I think it admissible evidence. No general rule can be drawn from it. No objection was made to its production; it came out, it seems, on the cross-examination of the defendant's counsel. Unless therefore manifest injustice had been done on the whole case, there is no ground for a new trial. Here appears to be good reason for the verdict (*k*).

DENNISON, FOSTER, WILMOT, Js., *accord*.

Rule was discharged.

(*k*) On the authority of this case, *Heath*, J., admitted the declaration of a person, who, having set his name as subscribing witness to a bond, in his dying moments begged pardon of Heaven for having been concerned in forging it, as evidence of the forgery; cited by Lord *Ellenborough*, 6 East, 195. But, in a late case, the dying declarations of A. were held not to be receivable in proof of a pedigree: there *Bayley*, J., said; "the case of the sub-

scribing witness seems to be founded on this: he must have been called as a witness, if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence;" *Doe dem. Sutton v. Ridgway*, 4 B. & A. 53. See also *Avon v. Kinnaird*, 6 East, 188. With respect to

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revocations of wills devising real property, there seems to be this distinction, that such a will cannot be revoked by a subsequent will or codicil, unless such will or codicil be executed with the formalities required by the statute of frauds; but such a will may be revoked by an instrument, imperfect in itself, but which, if effectuated, would have been a specific revocation: as a deed of feoffment without livery of seisin; a deed of bargain and sale without enrolment; 1 Roll. Abr. *Devise*, (P); 8 Vin. Abr. *Dev.* (P) pl. 6; Went. Off. Ex. 22, 3 Atk. 803. So also a grant to a person incapable of taking under it is a revocation; as where a man having made his will, devising land, granted all his substance to his wife by deed poll; *Beard v. Beard*, 3 Atk. 72. A subsequent will properly executed, and having existence as a will, though void from extrinsic circumstances, may operate as a revocation; as a second will devising lands in fee to

the heir at law; in *Ellis v. Smith*, 1 Ves. Jun. 17; to a papist, *Roper v. Radcliffe*, 1 Bro. P. C. 450, or 5 Bro. P. C. 360 (Tomlin's ed.), 10 Mod. 233; (as to papist's disabilities, see Harg. Co. Lit. 391 a, n. [346]); to the poor of the parish, *Frenche's Ca.*, 1 Roll. Abr. *Devise*, (O) pl. 4, 8 Vin. Abr. *ibid.*; or to a corporation, 8 Vin. Abr. *ibid.* Whether a power of appointment ill executed be a revocation, seems not quite decided; *Shove v. Pincke*, 5 T. R. 124; *Heli v. Bond*, 1 Ab. Eq. Ca. 342: see 2 Roberts on Wills, 20, (3rd ed.). As to revocations generally, see *Ex parte Ilchester*, 7 Ves. Jun. 374; *Hick v. Mors*, Amb. 216, 2 Ld. Ken. Ca. in Chanc. 117; *Abney v. Miller*, 2 Atk. 593; *Sparrow v. Hardcastle*, 3 Atk. 803, 7 T. R. 416, n. (a), 1 Ld. Ken. 67; *Harwood v. Oglander*, 6 Ves. Jun. 199; and *Roe v. Griffiths*, post, 605; *Goodright v. Harwood*, post, 937; *Bibb v. Thomas*, post, 1043, and *Roe v. Heyhoe*, post, 1114.

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MEDHURST v. WAITE.

S. C. 3 Burr. 1259.

High-constable, by himself or deputy, may billet soldiers under the mutiny act.

TRESPASS for billeting soldiers by a deputy high-constable. Verdict for defendant. Motion for new trial. Held by the Court, that a high-constable is an officer within the mutiny act, for billeting of soldiers; and that he may occasionally appoint deputies, whose acts, in their principal's absence, will be good; and therefore new trial denied. *Webb*, for the defendant, cited *Phelps* and *Winchcomb*, Moor, 845; 3 Bulst. 77, 1 Ro. Rep. 274, 1 Ro. Abr. 591; Sir *Walter Vane's Case*, 2 Keb. 309, 1 Sid. 355, but best in 1 Lev. 233; also March. 30; 1 Hale, P. C. 2 Hale, P. C. 88.

THE KING v. SCOTT.

S. C. Ante, 291.

If four are indicted for a riot, two die before trial, and two are found guilty, Court will intend that evidence was given against them all.

NORTON and *Stow* shewed for cause, that two of the defendants were not acquitted, but were dead before the trial. And as, after a verdict, the Court will suppose every thing in order to support it; it therefore comes to the same, as if the indictment had been laid, "together with other persons unknown;" in which case it has been held, (*K. against Moor and Kinnersley*, Stra. 193), that if *two only* are found guilty, yet the verdict implies, that a riot was committed by the assistance of some of the unknown persons. So here, as two of the defendants were dead, and the verdict finds two others guilty of a riot, the Court will intend, that the jury had evidence that one at least of the dead men was concerned in it. And of that opinion was the Court, and discharged the rule.

HILARY TERM,—2 GEO. III. 1762.—K. B.

THE KING *v.* HEYDON.

ON an information for election bribery, the prosecutor moved for a rule to inspect, and take copies of the books of the corporation of Evesham, in order to prove one Robins, who was to be produced as an evidence for the prosecutor, to be a free-man of Evesham. But, being an attempt to make the corporation furnish evidence in a criminal prosecution, the Court refused it, on the authority of the *King and Purnell*, Mich. 22 Geo. 2, page 37(a).

Rule to compel a corporation to furnish evidence from their books in a criminal prosecution denied.

[*S. C. post*, 356, 404.]

(a) See also *Young v. Lynch*, ante, 27, and *Allan v. Tapp*, post, 850.

CHURCHWARDENS OF ST. SAVIOUR'S, Southwark, *v.* SMITH.

S. C. 3 Burr. 1271.

A LEASE was granted to I. S., with covenant on his part to pull down certain old houses, and to rebuild others within seven years; lessee neglects to do this, and after the expiration of the seven years assigns his lease to Smith, against whom the lessors bring action of covenant.

Assignee of a lease after a breach of covenant by the lessee, not liable for the breach.

Lord MANSFIELD, C. J., *et tot. Cur.*—The only question is, whether, when a breach of covenant is complete, and an assignment afterwards made, the assignee is liable for a breach, which he never committed. The case is already settled in *Moor, Salkeld, &c.* (b).

Judgment for the defendant.

(b) *Grescott v. Green*, 1 Salk. 199, where Holt, C. J., said, that a covenant shall not bind the assignee, if it be broke before the assignment: *aliter*, if broke after, as if lessee had assigned before the time expired. As to what covenants run with the land, and for breach of which the assignee is liable, see *Spencer's Case*, 5 Rep. 16 a,

which is the leading case on that subject: see also *Bally v. Wells*, 3 Wils. 25, where the resolutions in *Spencer's Case* are inserted; *Mayor of Congleton v. Pattison*, 10 East, 130; *Vernon v. Smith*, 5 B. & A. 1; 6 Vin. Abr. *Covenant* (M); 3 Bac. Abr. *Id.* (E), 3, pa. 70; 3 Com. Dig. *Id.* (C 3.)

THE KING *v.* BARKER and Others.

S. C. Ante, 300.

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MR. Dunning, in last Michaelmas Term, shewed for cause, that a writ of *mandamus* is a mere legal remedy, applicable only to legal rights; that Mence's right (if any) is only an equitable right, the whole being vested in trustees. The remedy lies in Chancery, if at all, this being the first application of the kind in a Court of law. And also, in point of fact, an-

Mandamus to trustees to admit a Dissenting teacher.

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v.
BARKER.

Extent of the
writ of *mandamus*.

other person (one Hanmer) was actually chosen by, what we say is, the legal power of the congregation.

Lord MANSFIELD, C. J.—I think I have seen it in the books, that the first instance of a *mandamus* in the case of a corporator, was *Baggs's Case* (c). And yet, that was no objection to the granting it. A *mandamus* is certainly a prerogative writ, flowing from the King himself, sitting in this Court, superintending the police, and preserving the peace of this country; and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it (d). Therefore, it is not grantable for a living, because there the law has provided a specific remedy; but for a lectureship, where a profit or endowment is annexed to it, it is (e). Since the Act of Toleration, Dissenters are entitled to all manner of legal protection. Charities to their mode of worship have been established since the Revolution, though held to be superstitious before.

However, there appearing to be strong objections to the elections of both Mence and Hanmer, the Court recommended it then to stand over; to see, whether they would not either proceed to a new election, or put the validity of Hanmer's election in a mode of trial. And now in this Term, the Presbyterian trustees having refused to come into any agreement, a *mandamus* to admit Mence was granted. * But his party, finding their election was not maintainable in point of law, gave it up, and proceeded more regularly to a new election of him: and, as the trustees still refused him admission, a new rule for a *mandamus* was applied for, and granted in Easter Term (f).

(c) 11 Rep. 93 b.

(d) See *R. v. Bishop of Chester*, 1 T. R. 396; *R. v. Marquis of Stafford*, 3 T. R. 646; 4 Bac. Abr. *Mandamus* (C) 2; and post, 552, 708.

(e) But not for a lectureship, the stipend of which depends solely upon voluntary contributions, for the rector may refuse the use of the pulpit, the fee of the church being in him; unless there be a contrary immemorial custom; *R. v. Bp. of London*, 1 Wils. 11, 2 Stra. 1192; *R. v. Emden*, 1 T. R. 331; *R. v. Field*, 4 T. R. 125.

And see *R. v. Bp. of Exeter*, 2 East, 462; *R. v. Bp. of London*, 13 East, 419; *R. v. Abp. of Canterbury*, 15 East, 117; *R. v. Bp. of Carlisle*, 2 Burn's Ecc. L. 113 (ed. 1809); *R. v. Bp. of Litchfield & Coventry*, 2 Barnard. 365, 428, as to licensing a schoolmaster.

(f) A peremptory *mandamus* afterwards went by consent; 3 Burr. 1379. See also *R. v. Jotham*, 3 T. R. 575; *R. v. Bp. of Chester*, ante, 22; *R. v. Justices of Derbyshire*, post, 606.

FENTON v. EMBLERS, Executor of MAY.

S. C. 3 Burr. 1278.

An agreement to leave money by will need not be in writing, though uncertain as to the time of performance.

IN case; declaration states, that May hired Fenton as a housekeeper, at 6*l.* a year, so long as both parties pleased, and was to leave her 16*l.* a year for her life, by his will. This was a parol agreement. May dies, and leaves her nothing; whereupon she brought her action against the executors. The Jury found a verdict for the plaintiff, subject to the opinion of the Court on these questions:—1st. Whether the agreement should

not have been in writing, under the statute of frauds (g): 2d. Whether evidence of hiring for a year (as was the fact) was proof of a hiring for so long as both parties pleased (as laid in the declaration).

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Hall, for the defendant, cited 5 *Viner*, Contract, pa. 524, *Reynolds* and *Spencer Couper*, 1726, in Scacch.; bill for specific performance of a promise to make plaintiff deputy clerk of the House of Lords in consideration of procuring a reversionary grant of the principal office for the defendant's son. Defendant pleads, 1st, Statute of Frauds; because the promise was not in writing, nor to be performed within a year; and 2dly, Statute of Limitations; because the promise was made above six years before the bill filed. Allowed in both respects; for, by the Court:—A promise by parol to be performed upon a contingency, which may or may not happen within a year, is void: and, 2dly, if made above six years before suit, it is barred by the Statute of Limitations, though the contingency, or time of performance, may happen within the six years. And he observed the danger that might ensue from this method of making a parol testament.

**Stowe*, for the plaintiff, insisted, that all contracts for marriage at an indefinite time, which are allowed to be good, though not in writing, depend upon the very same principle; and he cited 1 *Salk.* 280; a promise by parol to pay money on the return of such a ship, which did not in fact return till two years after, held by all the Judges not to be within the Statute of Frauds, as the ship might by possibility return within the year; and the statute extends only to such promises, where, by the express appointment of the party, the thing is not to be performed within the year. Also Lord Raym. 316 (h), a promise to pay money on a marriage at a time indefinite. [*354]

LORD MANSFIELD, C. J.—The case in *Viner*, so far as it respects the Statute of Limitations, is clearly erroneous; for it says, the statute does not run from the time of the contingency happening, but from the making of the promise; whereas the statute proceeds upon the presumption of *laches*, which can never happen till after the contingency is determined (i).—

Statute of Limitations in case of a contingency does not run from the time of making, but from the contingency happening.

(g) 29 C. 2, c. 3, s. 4, by which it is enacted, "That no action shall be brought whereby to charge any person upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And such memorandum must contain the consideration for the promise; see *Saunders v. Wakefield*, 4 B. & A. 595, and cases there cited; confirmed in *Jenkins v. Reynolds*, 3 Brod. & B. 14; *Russell v. Mosely*, Id. 211.

(h) Where the case of *Peter v. Compton*, Skin. 353, is alluded to, in which case it was resolved by a majority of the Judges,

(*Holt*, C. J., *dissent.*), that, "where the agreement is to be performed upon a contingency, and it does not appear on the face of the agreement, that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year: but where it appears, from the whole tenor of the agreement, that it is to be performed after the year, there a note in writing is necessary." See note (k) *infra*.

(i) *Shutford v. Berrough*, Godb. 437; *Webb v. Martin*, 1 Lev. 48; *Wittersheim v. Lady Carlisle*, 1 H. Bl. 631; *Topham v. Braddick*, 1 Taunt. 572, *acc.* See also *Short v. M^cCarthy*, 3 B. & A. 626; *Whitehead v. Howard*, 2 Brod. & B. 373; *Clark v. Hougham*, 2 B. & C. 149, 3 D. & R. 322.

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In the case at bar I have no doubt. As to the variance, which is the second question, it is immaterial. And, as to the first; had it been intended as an evasion of the Statute of Frauds, it might have been considered at the time of trial; for it is no testamentary contract, but a matter to be weighed in all its circumstances by a Jury.

DENNISON, J.—The Statute of Frauds expressly mentions cases, that are not to be performed within the space of a year. This confines it to such as are specifically so, at the time of making.

WILMOT, J.—I have no doubt. The rule laid down in *Sal-keld* is the true rule (k).

Postea delivered to the plaintiff.

(k) *Anon.* 1 Salk. 286, cited *supra*.—The principal case was referred to in *Boydell v. Drummond*, 11 East, 142. There it was decided, that if it appear to have been the understanding of the parties to a contract, at the time of making it, that it was not to be completed within a year, though it might be, and was in fact, in part performed within that time, it is within the Statute of Frauds; and if not in writing, signed by the party to be charged, &c. it cannot be enforced against him. *Per Lord Ellenborough*;—"It has been argued that an inchoate performance within a year is sufficient to take the case

out of the statute; but the word used in the clause of the statute is *performed*, which, *ex vi termini*, must mean the complete performance or consummation of the work: and that is confirmed by another part of the statute (s. 17), requiring only part performance of an agreement, to supersede the necessity of reducing it into writing; which shews, that, when the Legislature used the word '*performed*,' they meant a complete, not a partial, performance;" 2 Camp. 157, S. C., but not S. P. See also Bulk. N. P. 280, and *Simon v. Meivier*, *post*, 599.

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INGLES v. WADSWORTH and Another.

S. C. 3 Barr. 1284, Sayer's Costs, 215.

One of two defendants in replevin cannot have his costs upon acquittal.

IN replevin, one defendant was found guilty, and the other acquitted. The question was, whether the latter could have his costs under the statute, 8 & 9 W. 3, c. 11, sect. 1.

LORD MANSFIELD, C. J.—The Court, upon the principles of natural justice, has a strong bias to entitle the defendant to costs: But the case is too fully settled. It is said, that a replevin is an action of trespass, and as such is within the statute. But the trespass mentioned in the statute has always been construed to be trespass *vi et armis*. The cases are too strong to permit us at present to consider that statute with a latitude: The Court has uniformly construed it strictly, and therefore trover was never allowed to be within it (l).

The Case of *Dibbins* and *Cooke*, Stra. 1005, is not fully reported there. Lord *Hardwicke* took it to be settled, that the statute must be construed strictly: and therefore, though that was an action of trespass on the case, being for a nuisance; yet, not being an action of trespass *vi et armis*, it was held not to be within the statute. This is a much stronger case than the present. For replevin is by no means any kind of trespass.

The statute 27 Eliz. c. 8, which creates the Court of Ex-

(l) *Poole v. Boulton*, Barnes, 139.

chequer Chamber for error out of this Court, mentions divers actions, and among others trespass. But in 2 Roll. Rep. 434, it is held, that replevin was not an action of trespass, and therefore, error in replevin would not lie in that Court. It was observed in *Dibbins* and *Cooke*, that the word trespass, in the statute of limitations, was held to signify all actions of trespass. But that statute is always construed liberally, this statute strictly.

Rule for taxing costs for the defendant discharged (m).

(m) As to the costs in replevin, see 6 Abr. Costs (F), pa. 52; 11 G. 2, c. 19, s. Vin. Ab. Costs (C), and Supp. *Id.*; 2 Bac. 22; Tidd's Pr. 990 (ed. 1831).

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THE KING v. HEYDON, *et al.*

S. C. 3 Burr. 1304.

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INFORMATION against the defendants, for bribery at the last election for Evesham. Prosecutor gave notice of trial, but did not proceed according to the notice, whereupon the defendant obtained a rule for the master to tax costs: Which rule *Morton* moved to discharge, supported by *Norton*, Solicitor-General; because, 1st, The information had not been filed a year; 2dly, Philips, the defendant's agent, had secreted the corporation books, which were material evidence for the prosecutor; though the Court had before refused in this Term (v. page 351) to make a rule on the corporation to produce them, as being in a criminal suit.

Costs to be paid for not trying an information according to notice, though not filed a whole year.

Stowe and *Ashhurst* shewed for cause, that Philips being town-clerk, had the books in trust, and was not bound to disclose them; or, if bound, that he never received a proper and legal notice. That, if the prosecutor's evidence was defective, he must stand to the consequences. That the statute (n) which gives costs only if the information be not tried within twelve months, relates to the whole merits of the cause, and not to costs for not going on to trial after notice given, which are payable without the aid of the statute; payable on indictments (o), payable by executors (p), &c.

Norton, Solicitor-General, replied, That Philips, from day to day, flattered the prosecutor that the books should be produced. So sworn in his affidavit. That the town-clerk was not the proper officer for the custody of the books, but the chamberlain, who demanded them in Court, and was refused.

LORD MANSFIELD, C. J.—By the constant course of the Court, and universal practice, costs must be given wherever the prosecutor gives notice, and does not proceed to trial: No instance to the contrary (q). An exception is contended for in

(n) 4 & 5 W. & M. c. 18, s. 2.

(o) *R. v. Powell*, 1 Stra. 33, S. P.

(p) *Elwes v. Maccalla*, 2 Ld. Raym. 865. But they are not liable, unless they have been guilty of a wilful default; *Ogle v. Moffat*, Barnes 133: see also *Creak v.*

Pitcarne, Cas. Pr. C. P. 158, P. Reg. 119.

(q) This position is confirmed by Lord *Ellenborough* in *R. v. Bartrum*, 8 East, 269; where upon an indictment for perjury, removed into K. B. by *certiorari*, the prosecutor having given notice of trial to

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the present case, on account of the misbehaviour of the defendant's agent, by drawing in the prosecutor to give notice, which made him forfeit his costs. This, if proved, would be a very strong case. But it does not *appear to be so. Prosecutor swears, "that he was flattered with expectations;"—These are conclusions, instead of facts. He should have sworn to the messages, and words which passed between them, upon which the Court would have formed the proper conclusion. Nor in fact was he flattered, for he subpoena'd Robins. His not producing evidence, which he was not by law obliged to produce, will not forfeit his principal's costs.

DENNISON, WILMOT, Js., same opinion. FOSTER, absent.

Rule for discharging the former rule discharged.

the defendant, and then withdrawn his record without countermanding his notice in time, it was decided, that he should pay costs to the defendant; *R. v. Allen*, Comb. 325; *R. v. Edwards*, Id. 419, 1 Salk. 193, where it is said, that the King shall not pay costs for not going on to trial, but if there be a prosecutor, he shall; and if the

defendant does not know who the prosecutor is, the Attorney-General shall inform him; *R. v. Powel*, Stra. 33; *R. v. Earl*, Id. 874, 8 P. If they are not paid, the defendant may, on an affidavit of demand and refusal, have an attachment, Tidd's Pr. 800 (ed. 1821).

OLDING v. ARUNDEL.

Leave to withdraw a plea of *non est factum*, and plead infancy.

ACTION of debt on a bond given by the defendant as surety for the father of a bastard child. Plea, *Non est factum*. Webb moved to withdraw this plea, and plead infancy of the obligor(r), on an affidavit of surprise; the defendant being advised he might give his nonage in evidence on *non est factum*.

Norton, Solicitor-General, *contra*. Because he appeared to the obligees to be of full age, being within a very few months of it, and having mist his time of pleading it, the Court will not now indulge him in so unfavourable a plea.

But by the Court.—We cannot overturn all the laws made for the protection of infants. This plea goes to the merits and substantial justice of the case(s).

Rule was made absolute.

(r) *Zouch v. Parsons*, 3 Burr. 1805; Com. Dig. *Pleader* (2 W 23).

(s) Though the defendant cannot commonly waive the general issue and plead specially, yet the Court will give him leave so to do, upon taking short notice of trial, paying costs, and giving judgment of the term, where it is not to the prejudice of the plaintiff, and where there has not been an affected delay; as to withdraw the general issue *non est factum*, and plead the statute of gaming, *Jeffreys v. Walter*, 1 Wils. 177; to plead a justification in tres-

pass, *Taylor v. Joddrell*, Id. 254; to plead double after joinder in demurrer to the general issue, *Meard v. Philips*, 2 Stra. 906; *Herbert v. Griffiths*, Id. 1181: so to plead it again with a notice of set-off, *Blackburn v. Mathias*, Id. 1267; upon paying money into Court, *Tarleton v. Wragg*, Id. 1271; with a notice of disputing the bankruptcy, &c., *Willock v. Smith*, 2 Camp. 184. But not to plead the statute of limitations, as that plea excludes the merits; *Cox v. Rolt*, 2 Wils. 253: but see *ante*, 35, n. (g).

FAIRCLAIM, Lessee of Fowler and Others v. Earl GOWER and Others.

S. C. 3 Burr. 1290.

IN ejectment, the defendants, who claimed the copyhold premises, as lords by escheat, had applied to the Court and obtained a rule to be made defendants on the common *terms; but having never been in the receipt of the rents and profits, *Ashhurst* moved in last Michaelmas Term (supported by *Nares* Serjeant, *Norton* and *Morton*) to discharge that rule, on a suggestion, that the stat. 11 Geo. 2(t), did not extend to such sort of claimants, but to *bond fide* landlords only mentioned in the preceding clause of the act. The Court then granted a rule to shew cause, and said, if the tenant in possession would act honestly and stand neuter, they would consider what could be done in it, it being a matter of importance and nicety; since the rule as it now stands will give the possession to the lords; the discharging it, will give it to the other side.

In the same Term it was argued in Court, and *Nares*, Serjeant, mentioned, *Roe* on demise of *Leak* against *Doe*, M. 29 Geo. 2, Common Pleas, 2 Barnes's Notes(v); held, that the Court cannot admit any one to defend an ejectment besides the tenant, except the landlord only;—And who is landlord within the act? Not he who claims title, but he who hath some kind of possession, by receiving the rent, &c. *Norton* mentioned lessee of *Gore* and *Scarsbrick*, P. 1 G. 3, King's Bench(u), S. P.; and on motion to make the claimant a defendant, the Court, on shewing cause, refused it, because he was not a landlord.

Harvey, *Madocks*, *Aspinal*, *Stowe*, and *Thurlow*, shewed for cause, that lords by escheat are landlords, and have a seisin in law. They need not, therefore, be in actual possession: For which reason, a lord of a manor may avow a distress, even if there be a tenant in possession. In the cases cited, there was no seisin in law. In the first, the question turned upon the comparative validity of two wills; in the second, upon a title by purchase. That the 11th, 12th, and 13th sections of the stat. 11 Geo. 2, are material to shew, that the act extends to landlords *de jure*, as well as *de facto*; for, if actual perception of the rents and profits be necessary, no heir or purchaser can have the benefit of this act. That the lord by escheat is the *ultimus hæres*, and possession of the tenant is possession of the heir; therefore, of the lord by escheat. In *Fenwick* and *Gravenor*, 7 Mod. 70, held, that it is due of right (long before this statute, Mich. Term, 1 Ann.) for the landlord to be made a defendant; else the tenant in possession might combine with the lessor of the plaintiff, and oust the landlord of his rent. In Comb. 209, said by *Holt*, C. J., that by the common rule, no man is to be admitted a defendant in ejectment, unless he hath been in possession or received rents, and not a mere

Seemle, that one claiming as lord by escheat shall [*358] be admitted a defendant in ejectment brought against the tenant in possession by the lessee of one claiming as heir at law.

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(t) C. 19, ss. 11, 12, 13.

(v) P. 193, 8vo. ed.

(u) 3 Burr. 1291, in marg.

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stranger. So it stood by the common law. The statute 11 Geo. 2, meant to make the perception of rents no longer necessary; else it meant nothing.

Lord MANSFIELD, C. J.—I don't understand the case in Barnes. It is, however, grounded on a case in Strange^(w); which, if it be as cited, is clearly wrong. The principal question is of very general consequence. We will think of it till the second day of next Term. There are two points to be considered: 1st, Who are landlords; that is, whether a person, standing in the place of a person deceased, has a right to be admitted a defendant, though never in the possession or perception of rents: 2dly, Whether one person claiming as heir (which is the case of *Fowler* here) and another as lord by escheat, (which is the case of *Earl Gower*) though they might have such a right against a mere stranger, can have it against each other; for to be made a defendant, they must beg the question in dispute; *vis.* That he is heir, or that he is lord by escheat; which he cannot be, if the other is heir.

Afterwards, in this present Term, Lord *Mansfield* declared, that the Court had still some doubts. That in *Gore* and *Scarsbrick* the tenant opposed both the contesting landlords, which varied the case. That in the case out of Barnes, the contest was between the heir-at-law, and the devisee of a copyhold estate without surrender to the use of the will: So reported by Bathurst, J. The devisee had therefore no colourable title. *Quære*, What was the practice before the stat. 11 Geo. 2.? A statute may correct errors in practice; but that does not preclude the Court from making the same regulations by its own authority, or even carrying the matter farther. Thus, by the statute for the amendment of the law, if a man dismisses his

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own bill in Chancery, he shall pay taxed *costs, and not 40s. only. The Court might have made this rule, without the aid of the statute: And, in Lord *Hardwicke's* time, the Court has gone much farther. If the plaintiff went on to set down his cause for hearing, and then dismiss his bill, it is not within the statute; but the Court made the same rule in both cases. *Quære* also, whether there can be any reason for making any landlord a co-defendant, and not admitting him to defend solely, when the tenant gives up the possession? Another argument was ordered in the latter end of the Term; when it was argued by

History of ejectments (z)

Harvey for the defendants: That two writs of ejectment were formerly in use, *ejectione firmæ* and *quare ejecit infra terminum*. Judgment in the former was for damages, in the latter to recover the term. In 14 Hen. 7th, the experiment was first tried to introduce judgment to recover the term in *ejectione firmæ*, in the King's Bench; and in 17 Hen. 8th, in the Common Pleas^(y). From this period it became a method of trying titles. Many Judges thought the action of trespass a

(w) *Jones v. Edwards*, 2 Stra. 1241:

See also *Goodright v. Hart*, Id. 830.

(z) See also *Aslin v. Parkin*, 2 Burr. 665.

(y) *Fitz. N. B. Ejectione firmæ*, 506 (ed. 1755); Bac. Abr. *Ejectment* (A).

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better way; because by special pleading the title might be there set forth, and all surprise prevented. The first improvement made, was setting up a casual ejector, about the time of the troubles; 1 Keble, 705(z). In the time of Rolle, C. J., a new rule was invented, to admit the tenant a defendant; Styl. 368; Sid. 24; Lilly Abr. 497. But the Court would not oblige the tenant to make a defence, though the landlord offered to indemnify him; Cooke's Practice of C. P. 99, 6 Geo. 2(a): Same Point 7 Geo. 2, Barnes, 114(b), and 8 Geo. 2, Barnes, 120(c). These were before the late statute. In Comb. 339, a motion not to make Lord Bath a defendant, because rent was paid to Lord Montague only; but because Lord Bath had a reversion, the Court admitted him. So trustees and mortgagees have often been admitted defendants, though never in perception of the rents(d). *The rule long before the act of Parliament [*361] was, that mere strangers shall not be admitted as co-defendants, —but such as are not strangers may; Comb. 209; Salk. 257. A lord by escheat is no stranger to the possession; Lord *Buckhurst's* Case, 1 Rep. 2 b. A lord by escheat is favoured by the law, and shall have all the deeds, charters, &c. delivered to him.

Upon the whole, the Court inclined to make the rule absolute, for discharging Lord Gower from being a co-defendant; whereupon *Harvey* proposed, which was accepted, that proceedings on the present ejectment should be staid; that Earl Gower, &c. should bring another, and admit the lessor of the plaintiff in the present cause a defendant, and should try the cause at the next assizes. So the present rule was enlarged, till after the trial should be had(e).

Lord MANSFIELD, C. J.—In all real actions, at common law,

(z) *Keys v. Braydon*; T. Raym. 93, S. C.

(a) S. C. Barnes, 173 (8vo. ed.), *Right v. Wrong*.

(b) P. 173, *Balderidge v. Paterson*.

(c) P. 175, *Goodright v. Wrong*.

(d) S. P. *Doe dem. Tilyard v. Cooper*, 8 T. R. 645.

(e) It appears from the report in 3 Burr. that this arrangement was made by consent, and the Court said, that the lord's bringing an ejectment was the most proper issue for trying his right. And *Ld. Mansfield* added, that if the heir had refused to accede to this course, the Court would have admitted the lord to defend: which clearly shews their opinion to have been, that the lord, claiming by escheat, could be made defendant. The Court will not permit a *cessui que trust*, not having been in possession, to be made defendant in ejectment instead of the tenant: but they will permit the heir at law, or remainder man, claiming under the same title; *Loxlock dem. Norris v. Lancaster*, 3 T. R. 783; or a devisee; S. C. 4 T. R. 122. Where the tenant in possession came in under an agreement with the lessor of the plaintiff

for a term of years, which had expired, and paid rent to him, and afterwards disclaimed; a third person, having entered into the landlord's rule, cannot set up his title in defence of the ejectment. *Dampier, J.*—"The tenant ought to give back the possession to the lessor, and after that the defendant may have his ejectment. It has been ruled often, that neither the tenant, nor any one claiming by him, can convert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord;" *Doe dem. Knight v. Smythe*, 4 M. & S. 347. And where the landlord defended an ejectment in the name of the tenant, an illiterate person, who gave a *retraxit* of the plea and a *cognovit* of the action, and the plaintiff knew that the cause was, in fact, conducted by the landlord's attorney, and at his expence; the Court made a rule absolute for setting aside the judgment, cancelling the *retraxit* and *cognovit*, and admitting the landlord to defend; *Doe dem. Locke v. Franklin*, 7 Taunt. 9—See *Driver dem. Oxendon v. Lawrence*, post, 1259, and *Ward v. Badtittle*, post, 763.

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before statute West. 2, wherever tenant of the freehold made default, the reversioner or remainder man had a right to come in, and defend the possession. Because, if judgment was had against the tenant in possession, it turned the estate of those behind to a right. This is however expressly allowed by statute West. 2, c. 3. I should wonder therefore, how it ever could be a doubt, whether in ejectments, before the act of Parliament, a landlord should be admitted to defend, when the tenant refused; especially, as he was allowed to be a co-defendant with his tenant.—It is somewhat strange, that two acts of Parliament, at five hundred years distance, *viz.* Westm. 2, and 11 Geo. 2, both upon the same point, should be made, as introductory of a new law, which was provided for by the common law, long before.

[362] SITTINGS AT GUILDHALL AFTER HILARY TERM, 1762.

COMPTON and Others, Assignees of MOORE, v. BEDFORD.

Assignment of all, except a trifle, of a man's stock in trade in favour of particular creditors, just before an act of bankruptcy committed, is fraudulent and void.

MOORE, finding his circumstances on the decline, but willing to give a preference to some favourite creditors, made an inventory of all his goods and stock in trade (some few particulars excepted, to the amount of about one hundred pounds), and at midnight made a bill of sale of them, in trust to pay those creditors their full debts; leaving debts to the amount of nine hundred pounds unprovided for. Next morning he absconded, and a commission of bankruptcy was afterwards taken out: And this action was brought by the assignees against the trustee to recover these goods for the benefit of the creditors in general.

LORD MANSFIELD, C. J.—There is no doubt but that a trader, before an act of bankruptcy committed, may pay a fair and honest creditor, not only in money, but in goods; and not only actually pay him, but give him a security which will be valid. The cases have gone as far as they could go;—even where the debtor had the state of his circumstances in his contemplation. The Case of *Cock and Goodfellow*, 10 Mod. 489, stood upon a different ground. The transfer of the stock, for the benefit of the bankrupt's children, was doing no more than the Court of Chancery would have ordered to be specifically done. *Small and Owdly*, 2 P. Wms. 427, went farther; it was thought to go full far enough (*f*). The bankrupt was a goldsmith, and had a separate adventure in the wine trade, which separate adventure he assigned to a particular creditor; and held to be good. But had he assigned the whole of his stock in trade, it would have been void; because the very deed of assignment makes him a bankrupt; he not having any thing left to trade upon. The deed itself would be an act of bankruptcy.

(*f*) See *post*, 442, n. (*i*).

Other cases, that have since been adjudged, were, where *all* the effects were assigned over; but I never gave my opinion upon those cases, without at the same time declaring, * that an exception of part (that was fraudulent only) would not make the assignment valid. In the present case, they have made a deed which creates an insolvency. The assignor must go off the next morning; else his possession will be colourable. The interest, which is omitted in the assignment, is too minute to make a difference. The assignor has given up all his power of trading for the future. His very sign and sign-iron make part of the goods assigned. And another strong badge of fraud is the suspicious hour at which the transaction is done; being only twelve hours before he actually went off. I am therefore clearly of opinion, that the deed is fraudulent and void.

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Jury found a verdict for the plaintiffs (g).

(g) See *Hooper v. Smith*, post, 441; *Law v. Skinner*, post, 996.

EASTER TERM,—2 GEO. III. 1762.—K. B.

MONTEFIORI v. MONTEFIORI.

S. C. Cited 1 Bro. Ch. Ca. 548.

JOSEPH Montefiori, a Jew, being engaged in a marriage treaty, his brother Moses, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between him and his brother Joseph; which balance he (Moses) acknowledged to have in his hands; though, in truth, no such balance, or any thing like it, existed. After the marriage had, Moses reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which Joseph refused to do; upon which the Court was moved for an attachment against him for non-performance of this award; and on his part a cross motion was made to set aside this award, on a suggestion that the arbitrators were mistaken in point of law.

A note, given fraudulently, to carry on a marriage treaty, shall be good [* 364] against the drawer, though given without any consideration.

Lord MANSFIELD, C. J.—The law is, that where, upon proposals of marriage, third persons represent any thing material, in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It *shall be*, as represented to be. And the husband alone is entitled to relief, as well as when the fortune, &c. so misrepresented has been specifically settled on the wife: For no man shall set up his own iniquity as a defence, any more than as a cause of ac-

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tion (h). The arbitrators therefore being clearly mistaken in point of law, the award must be set aside (i).

DENNISON and WILMOT, Js., of the same opinion. FOSTER, absent.

Rule for the attachment discharged; rule for setting aside the award made absolute.

(h) So where A., on a treaty of marriage between B. and the daughter of C., concealed from C.'s agent (at B.'s request) a demand, which he had against B., and represented to him that there was no such demand, in order that C. might believe that B. was not in debt to the amount he really was, and might more readily consent to the marriage; an injunction was granted to restrain A. from recovering his demand from B., after the marriage had taken place; *Neville v. Wilkinson*, 1 Bro. Ch. Ca. 543; see Mr. Eden's Notes, *ibid.*; *Eastbrook v. Scott*, 3 Ves. Jun. 456; *Dalbiac v. Dalbiac*, 16 Ves. Jun. 125; ex parte Carr, 3 Ves. & B. 111; Bac. Abr. Marriage (D), s. 3. In general the question as to the want of consideration of a bill of exchange or promissory note, may be entered into between immediate par-

ties; see *Jefferies v. Austin*, 1 Str. 674; *Lickbarrow v. Mason*, 2 T. R. 71; *Puget de Bras v. Forbes*, 1 Esp. 117; see also *Grant v. Vaughan*, post, 485, *Guichard v. Roberts*, post, 445, and notes. As to whether a promissory note is good as a gift, and an action maintainable thereupon, see *Tate v. Hilbert*, 2 Ves. Jun. 111.

(i) The reasons, which induce an arbitrator to make his award, must appear upon the face of it; or of some paper delivered with and intended to be considered as part of the award, in order to enable the Court to examine them, and set aside the award, if the arbitrator has mistaken the law; *Kent v. Elstob*, 3 East, 18; and they will not set it aside, if the law be doubtful; *Richardson v. Nourse*, 3 B. & A. 237. See *Pickering v. Watson*, post, 1117.

MAXWELL v. MAYRE. (Ante, 271.)

Scots manufactures may be vendid in England by whole-
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sale without a licence from the hawker's office.

LORD MANSFIELD, C. J., delivered the opinion of the Court very briefly, thus: That we are all of opinion, that the linen manufacture of Scotland is now the linen manufacture of this kingdom:—that all arguments drawn from *usage to the contrary are out of the case; as upon inquiry at the hawker's and pedlar's office we find that no such usage exists:—And therefore,

Judgment for the plaintiff.

LOWE v. JOLLIFFE.

Subscribing witnesses to a will, who swear to the testator's insanity, contradicted by other evidence.

ON a trial at bar on an issue out of Chancery, *devisavit vel non*, concerning lands in Worcestershire, the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, and a dozen servants of the testator, all unanimously swore him to be utterly incapable of making a will, or transacting any other business, at the time of making the supposed will and codicil, or at any intermediate time (k). To encounter this evidence, the

(k) *S. P. Fike v. Bradbury or Bradmaring*, Bull. N. P. 264, cited in Andr. 224, 237, 2 Str. 1096; *Austin v. Willes*, Bull. N. P. *ibid.*; *Hudson's Ca.*, Skinn. 49; *S. P. per Lord Mansfield*, in *Abbot v. Plumbe*, 1 Doug. 216. It was admitted

by Lord Kenyon, C. J., and Lawrence, J., that a subscribing witness is admissible to impeach the execution of an instrument, which he has himself attested; in *Jordaine v. Lashbroke*, 7 T. R. 604, 611. But his evidence is to be received with great jea-

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counsel for the plaintiff examined several of the nobility and principal gentry of the county of Worcester; who frequently and familiarly conversed with Mr. Jolliffe, the testator, during that whole period, and some on the day whereon the will was made; and also two eminent physicians, who occasionally attended him; and who all strongly deposed to his entire sanity and more than ordinary intellectual vigour. They also read the deposition of the attorney who drew and witnessed the codicil, who was dead, but his testimony perpetuated in Chancery; and who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct in directing the contents of his codicil. They also offered to examine Mr. Rupert Dovey, an attorney of unblemished reputation, who drew the will; whereby he and another were made executors in trust to sell part of the estate for payment of debts, with a legacy of 200*l.* each for their trouble. Before the will was contested, Dovey had so far acted in the trust, that he had contracted for and actually sold Mr. Jolliffe's chambers in the Temple to Mr. Gascoigne Frederick; but, in order to be a witness of Mr. Jolliffe's sanity, had voluntarily released his legacy (i). The counsel for the defendant still objected to his competency, 1st, As being an executor in trust, and so liable to actions; 2dly, As having acted under the trust; whereby, if the will was set aside, he became liable to answer Mr. Frederick for the damages sustained by an illegal sale of the chambers. And they cited 1 Sid. 51, 115, 1 Keb. 134. Mr. Frederick being in Court, publicly offered to enter into a rule to take no advantage of the event (however it might turn out) for the sake of public justice. But the Court thought there was no occasion for it.

An executor in trust, who has acted, may be examined as a witness.

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And by Lord MANSFIELD, C. J.—We don't now sit here to take our rules of evidence from *Siderfin* and *Keble*. In a modern Case, of *Holt* and *Tyrrel*, (which appears, in 1 Barnard. Rep. in the King's Bench, p. 12, to have been in P. 13. Geo. 1, 1727), it was held in a trial at bar, that a trustee might be a witness without releasing; and where is the difference between an executor in trust and another trustee? His being liable to actions makes no difference; for so are all agents, and yet they are allowed to be witnesses.

WILMOT, J.—I remember another trial at bar, wherein it was held, that a devisee in trust might be a witness. And no distinction was taken between his acting or not. *Holt* and *Tyrrel* was then cited and relied upon (m). *Dennison* and *Foster*, Js., absent.

lousy; *Howard v. Braithwaite*, 1 Ves. & Beam. 208, per Lord Eldon, C.; *Goodtitle v. Clayton*, 4 Burr. 2224. Where one of the witnesses would not swear to the sealing and publication of a will, *Holt*, C. J., held it sufficient to prove his attestation; *Dagwell v. Glascock*, Skinn. 413. A will may be proved by the evidence of one witness, although two of them swear

that the testator was incompetent; *Digg's* Ca., Skinn. 79.

(i) See ante, 17, n.

(m) Trustees and executors taking no beneficial interest under a will are competent witnesses to prove the due execution of it; *Goodtitle v. Welford*, 1 Doug. 139; *Phipps v. Pitcher*, 6 Taunt. 220, 2 Marsh. 20; per Cur. in *Tomlinson v.*

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Mr. Dovey was accordingly sworn; and upon the whole it appeared to be a very black conspiracy to set aside this gentleman's will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. The Chief Justice then declared himself fully persuaded, that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to have committed them in Court, but they had withdrawn themselves. However, a prosecution of some of them for perjury was strongly recommended by the Court. The three testamentary witnesses were afterwards convicted (n).

[*367] **Nares*, Serjeant, *Morton*, *Blackstone*, *Stowe*, *Ashhurst*, *Dandridge*, for the plaintiff. *Norton*, Solicitor-General, *Hewet*, Serjeant, *De Grey*, *Hussey*, *Yates*, and *Beacroft*, for the defendant.

Wilkes, 2 Brod. & B. 398, 5 B. Mo. 172. So is the wife of such executor; *Bettison v. Bromley*, 12 East, 250; see *Austey v. Dowsen*, ante, 8, et seq., and the cases there referred to. See also *Bent v. Baker*, 3 T. R. 27; *Buckland v. Tunkard*, 5 T. R.

578; *R. v. St. Mary Magdalen*, 3 East, 7; *Wyndham v. Chetwynd*, ante, 95, and notes.

(n) See their sentence, post, 416; *R. v. Nueys & Galey*.

ST. DEVEREUX v. MUCH DEW CHURCH.

S. C. Burr. Sett. Ca. 598.

No occasion to shew, that banns were actually published, or the marriage register regularly signed, to establish a marriage, quoad a parish settlement.

SUSANNAH Meredith was removed by an order from Much Dew Church to St. Devereux. St. Devereux appeals to the Sessions, who state specially, that Susannah's maiden settlement is in St. Devereux; that the settlement of John Meredith, her pretended husband, is in the parish of Llangarron; that it was proved by the oath of James Bowen, that he and one William Jones were present 7th Feb. 1758, when John Meredith and the said Susannah were married at the parish church of St. Devereux by the minister thereof by banns; and that the entry in the register stands thus, "1758, February 7; John Meredith and Susannah Jenkins were married by banns;" but that neither the minister, the parties, or the witnesses signed the said entry; nor was any other entry made. The Sessions were therefore of opinion that such marriage was not legally proved, and confirmed the order of removal.

Gryffydd Price shewed cause why these orders should not be quashed; that by stat. 26 Geo. 2, c. 33(o), marriage without publication of banns or licence is absolutely null and void.—That banns are now as much essential to a marriage, as livery

(o) See *Chinkam v. Preston*, ante, 192.

to a feoffment, or attestation to a will of lands. And here is no proof that banns were ever published.

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But the Court, without hearing Counsel on the other side, thought the proof of the marriage sufficient; and, by Lord MANSFIELD, C. J.—In a suit in the Ecclesiastical Court for jactitation of marriage, perhaps it may be necessary to prove, that all the solemnities of the Marriage Act have been punctually and regularly complied with: but, God forbid, that in other cases (the legitimacy of children and the like) *the usual presumptive proofs of marriage should be taken away by this statute. It was canvassed in Parliament, at the time when the act was made, and universally agreed, by all whose opinions were worth having, that it would not become necessary to prove the publication of banns, &c. (p). Besides, here the publication of banns is actually proved both by the entry in the register and the parol evidence of Bowen.

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But I think the minister highly blameable in not making the entries regular, according to the act, and that the Attorney-General should exhibit an information against him *ex officio*. For, upon his accuracy may depend the proof of pedigrees (which begin now to be very difficult) and the descent of real estates.

WILMOT, J., *accord.* DENNISON and FOSTER *absent.*

Both orders quashed by the Court.

(p) S. P. *Reade v. Passer*, Peake's N. P. [231]. Where a minor was married by license, his parents being dead and no guardian appointed, and when he arrived at full age his wife was *in extremis*, and soon afterwards died; the jury having presumed a subsequent legal marriage, the Court refused to disturb their verdict; *Wilkinson v. Payne*, 4 T. R. 468. But the party wishing to set aside a marriage may shew that the banns were not regularly published; *Standen v. Standen*, Peake's N. P. [32]. And though a marriage may be, and in strictness ought to be, proved by the register, or by an examined copy of it, there being also proof of the identity of the parties; (which need not be proved by the minister or subscribing witnesses; *Birt v. Barlow*, 1 Doug. 171); yet it may also be proved by any person present at the ceremony; even by the husband or wife, who are also competent witnesses to disprove it; *Standen v. Standen*, *ubi supra*; *Henley v. Chesham*, 2 Bott. 81. So, thirty years' cohabitation is presumptive evidence of a marriage; *R. v. Stockland*, Burr. S. C. 508; so, general reputation,

the acknowledgment of the parties, and their reception by their friends as man and wife; *per* Ld. Kenyon in *Leader v. Barry*, 1 Esp. 353; *Hervey v. Hervey*, *post*, 877; so, a sentence in an Ecclesiastical Court, or in a foreign Court, where the marriage came directly in question; *per* Ld. Hardwicke, C., in *Roach v. Garvan*, 1 Ves. Sen. 159. With regard to settlements by marriage, a certificate acknowledging the parties to be man and wife, *R. v. Headcorn*, Burr. S. C. 253; *R. v. Ullesthorpe*, 8 T. R. 465; *R. v. Lubbenham*, 4 T. R. 251;—an order removing them as man and wife, *R. v. Binegar*, 7 East, 377; or removing the woman as married, *R. v. Hinesworth*, Cald. 42, 1 Doug. 46, n.; *R. v. Towcester*, 2 Bott. 118;—are conclusive evidence against the parish so certifying or removing, and *prima facie* evidence between other parishes. This inference of a marriage from the above circumstances may be controverted, when not conclusive. But in prosecutions for bigamy, or actions for criminal conversation, an *actual* marriage must be proved; see *Morris v. Miller*, *post*, 632.

THE KING v. RISPAL.

S. C. 3 Burr. 1320.

Quarter Sessions has a jurisdiction over conspiracies.

LUCAS, supported by *Morton* and *Stowe*, moved to arrest the judgment on an indictment found and tried at the Westminster Quarter Sessions, which states (*q*), that Antoniene Rispal, Henry Bolney, and John Delaporte wickedly and unlawfully did conspire, &c. falsely to charge and accuse one John Chilton, "that he had then lately taken out of a bag, a quantity of human hairs, which bag was contained in a bale, which consisted of five bags of hair, of the goods and chattels of the said Antoniene Rispal:" that Bolney and Delaporte, in pursuance of the said conspiracy, said to Chilton, that he was a man of credit, and had better make it up, than have his credit blasted: and that A. Rispal, in further pursuance of the said conspiracy, unlawfully and wickedly did extort from said Chilton 30*l*. and a promissory note for 33*l*. as a composition for the said offence, and to desist from prosecution: whereas the said Chilton was never guilty of the said or the like offence,—to the damage of the said Chilton, to the evil example, &c. against the peace, &c.

[*369] *The exceptions taken were, 1st, That the Justices at Quarter Sessions have no jurisdiction over conspiracies, any more than over perjury, usury, and forgery; it not being specified in their commission, nor given them by any special statute: 2dly, The indictment does not charge them to have conspired to fix any crime on the defendant; but only taking hairs out of a bag, which might be a lawful act.

Norton, Solicitor-General, and *Baynham* shewed for cause, 1st, That the Quarter Sessions, under the general words of their commission, have cognizance of all crimes that tend, either directly or consequentially, to a breach of the peace: that conspiracies have this tendency, in the same manner as libels, which are indictable at the Sessions without being specified in the commission. So is extortion also, and this is a conspiracy to extort. 2dly, The charge is a conspiracy to extort money; (that is the *end* of the contrivance; the *means* are insignificant); and that Rispal did actually extort; which is a substantive charge upon him; and therefore, *quodcumque videtur*, there is ground sufficient for the Court to give judgment against Rispal.

Lord MANSFIELD, C. J.—This case lies in a narrow compass.

1st. The first question is, whether the Justices at Sessions have a jurisdiction over conspiracies. No authority has been cited to shew that they have not, nor that they have. It must therefore be determined upon general principles. The cases of per-

(*q*) See the indictment at length; Cro. Cir. Co. 135 (ed. 1811).

jury (r), forgery (s), and usury (t), stand upon their own special grounds; and it has been determined, that the Justices have no jurisdiction there. This offence of conspiracy is a trespass, and trespasses are indictable at Sessions, though not committed *vi et armis*. They tend to the breach of the peace, as much as cheats or libels (v), which are established to be within the jurisdiction of Sessions. As therefore there is no authority to the contrary, I think that the Justices had a jurisdiction here (w).

* 2dly. Whether a sufficient crime be laid in this indictment, to enable the Court to give judgment. The crime laid is an *unlawful conspiracy*: this, whether it be to charge a man with criminal acts, or such as only may affect his reputation, is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts, but as one and the same united and continued offence, pursued through its different stages. And then it is clear, that the whole will amount to an indictable offence; viz. the getting money out of a man, by conspiring to charge him with a false fact (w).

DENNISON, FOSTER, WILMOT, Js., *accord*.

Rule for arresting the judgment discharged.

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Getting money out of a man, by conspiring to charge him with a false fact, is indictable, whether the fact charged be, or be not, criminal in itself.

(r) The Justices at Sessions have no jurisdiction over perjury at common law; *R. v. Bainton*, 2 Stra. 1088; 2 Hawk. P. C. c. 8, s. 38. But they have jurisdiction over perjury under 5 Eliz. c. 9, for s. 9 expressly gives it them; 2 Hawk. *ib.* But indictments under that statute are rarely preferred.

(s) *Reg. v. Yarrington*, Salk. 406; *R. v. Gibbs*, 1 East, 173, in which case it was expressly determined, that the Sessions have no jurisdiction over forgery at common law, and they cannot take cognizance of it as a cheat: and, of course, not of forgery by statute, or any other newly created offence, unless such power be given them by the statute creating such offence. See *R. v. Alsop*, 4 Mod. 49.

(t) *Reg. v. Smith*, 2 Lord Raym. 1144, Salk. 680.

(v) 2 Hawk. *ubi supra*; *R. v. Summers*, 1 Lev. 139. A justice of the peace may commit a person charged with publishing a libel for want of sureties; *Butt v. Conant*, 1 Brod. & Bing. 548, 4 B. Mo. 195; in which case the authority of justices in cases of libel is fully discussed, and all the authorities are referred to.

(w) In a case in which a person had been indicted at the Sessions for soliciting a servant to rob his master, Lord Kenyon said, "I am clearly of opinion, that it is indictable at the Quarter Sessions, as fall-

ing in with that class of offences, which, being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction. To this general rule there are indeed two exceptions, namely, forgery and perjury; why excepted I know not, but having been expressly so adjudged, I will not break through the rules of law." *Le Blanc, J.*, "The general words of the commission of the peace comprehend all trespasses; and the word *trespasses* not only includes direct breaches of the peace, but also all such offences as have a tendency thereto: and on that ground conspiracies have been holden to be cognizable by the Sessions; not as actual breaches of the peace, but as tending thereto;" *R. v. Higgins*, 3 East, 5, where *R. v. Rispal* was cited and approved of. See 1 Hawk. P. C. c. 72; *Reg. v. Best*, Salk. 174, 2 Lord Raym. 1167.

(w) See *R. v. Spragg*, 2 Burr. 993; *Reg. v. Best*, Salk. 174, where it is laid down, that several persons may lawfully meet and consult to prosecute a guilty person; otherwise, if to charge one that is innocent, right or wrong; for that is indictable; *S. C.* 2 Ld. Raym. 1167; *R. v. Gill & Henry*, 2 B. & A. 204; 1 Hawk. P. C. c. 72; and see also 30 G. 2, c. 24, s. 1; 4 G. 4, c. 54, s. 3; *R. v. Parsons*, *post*, 392.

TRINITY TERM,—2 GEO. III. 1762.—IN CHANCERY.

BASKETT v. CUNNINGHAM and Others.

S. C. 2 Eden, 137.

Collusive notes to an edition of the Statutes will not take it out of the King's printer's patent. But Chancery will not decide [* 371] between two contending patents, by the summary way of injunction.

DEFENDANT, in conjunction with several booksellers, was publishing, in weekly numbers, A Digest of the Statute Law, containing the statutes at large, methodized under alphabetical heads, with large notes from Lord Coke and other writers of the law. He had contracted with Strahan and Woodfall, the proprietors of the patent for printing law books, to print this work, and it was print^d at their press. Baskett, the King's printer, (whose patent extends to all statutes, and which was confirmed as against all common printers in the Case of *Baskett* and the *University of Cambridge* (a), B. R. M. 32 Geo. 2), filed his bill against the proprietors and the law printers for an injunction; which was now moved for by *Yorke*, Attorney-General, *Sewell*, and *De Grey*, on the authority of that case, and the reasons urged in that argument; and also, because the notes subjoined to the present work appeared to be collusive, and merely calculated to shelter a pirated edition of the statutes (b).

Perrot, *Blackstone*, *Wilbraham*, and *Wedderburn*, shewed for cause; 1st, That this book was not within the meaning of the letters patent, being a work of labour and industry, and in a method entirely new; 2dly, That, as they had printed at a privileged press, there could be no ground for an injunction, without determining the respective merits of the two interfering patents, both of which were sanctified by long usage. And though the law patentees in their answer disclaimed any property in the work, and therefore the plaintiff prayed no injunction against them, yet an absolute injunction could not be granted against the proprietors, without virtually including the law printers; for if they were forbid to print anywhere, they were also forbid to print at their press.

LORD CHANCELLOR was of opinion, that the work was entirely within the patent of the King's printer, and that the notes were merely collusive. But he would not interfere between the two contending patents, in the summary method of injunction; but left them to adjust their respective rights in due course of law (c). He therefore ordered an injunction to

(a) *Ante*, 105; which see, and the notes thereto.

(b) An injunction was granted against a colourable abridgment of the Term Reports; *Butterworth v. Robinson*, 5 Ves. J. 709. But the publication of an abridgment fairly made will not be restrained; *Gyles v. Wilcox*, Atk. 143; *S. P. Dodsley v. Kinnersley*, Amb. 403, where it was also held, that an abstract of a work published in an annual register or magazine is not a piracy. But see *Macklin v.*

Richardson, Id. 694.

(c) A bill by the King's printer in Ireland to establish his right to print and distribute the copies of the statutes for Ireland, under the order of the King, upon the resolutions of both Houses of Parliament of the United Kingdom, and for an account against the King's printer in England in that respect, was dismissed. Lord Eldon, C.—“The question here is upon the legal right of the plaintiff; and, if he can maintain an action upon the legal right,

issue, to restrain the proprietors from printing at any other than a patent press: which, as Woodfall and Strahan were secretly in league with Baskett, and were at that time jointly concerned in a new edition of the statutes, was equivalent to a total injunction; the law printers finding means to elude their contract with Cunningham.

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the account is to be granted; if he cannot maintain the legal right, it is impossible to say he has an equity;" *Grierson v. Eyre*, 9 Ves. Jun. 341. See also to the point of not granting an injunction in cases where

the party applying could not maintain an action at law for the piracy; *Walcot v. Walker*, 7 Ves. Jun. 1; *Southey v. Sherwood*, 2 Meriv. 435. See also *Barfield v. Nicholson*, 2 Sim. & St. 1.

IN THE KING'S BENCH.

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THE KING v. HARRISON, Chamberlain of London.

S. C. 3 Burr. 1322.

MANDAMUS to admit I. S. to the freedom of the city, having served an apprenticeship with a member of the Clothworkers' Company, and being himself made free of the same.

The Chamberlain returns, that I. S. was by trade a butcher, and that, by a by-law of the city of London, all persons exercising that trade shall be free of the Butchers' Company; and therefore he refused to admit him to the freedom of the City. Upon this return, the validity of this by-law was argued by *Yates* for the Crown, and *Eyre* for the Chamberlain; and upon the whole, the Court was of opinion, that the by-law was a good one; and that the Case of *Wannell* and the *Chamberlains of London*, M. 12 Geo. 1, Stra. 675, on a similar by-law, with respect to the Joiners' Company, was directly in point; and therefore allowed the return (*d*).

By-law, that a butcher in London shall be free of the Butchers' Company, good.

(*d*) But see *Harrison v. Godman*, 1 Burr. 13, where the same by-law was held bad: but that decision appears to have arisen from the defective return to a *habeas corpus*, which did not set out a special and particular custom to support it. As to by-laws, see *Mitchel v. Reynolds*, 1 P. Wms.

181; *The Gunmakers v. Fell*, Willcs, 384, and cases there referred to; *Kirk v. Nowell*, 1 T. R. 118; *R. v. Fawcett*, 8 T. R. 352; *R. v. Ashwell*, 12 East, 22; *Adley v. Reeves*, 2 M. & S. 53; Vin. Abr. *By-laws* (B); Bac. Abr. *Id.* (B); Com. Dig. *Id.* (B 4).

HART *qui tam* v. HAWKINS.

S. C. 3 Burr. 1322.

DEFENDANT was charged in execution for a penalty recovered on a *qui tam* action, for exercising a trade, contrary to the statute 5 Eliz. (*e*). *Baynham* moved on the statute 22 Geo. 2, c. 28, to discharge him from the moiety of the penalty belonging to the informer, upon his giving up all his effects upon oath, according to the provisions of that statute. *Norton*,

Defendant on a *qui tam* action cannot be discharged on surrendering his effects, under the Lords' Act, 32 Geo. 2, c. 28.

(*e*) G. 4: in part repealed by 54 G. 3, c. 96: see *R. v. Pemberton*, ante, 230.

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Solicitor-General, *contra*; because this would prejudice the interest of the Crown, which is entitled to the other moiety; and it is clear, that all the provisions in the statute 32 Geo. 2, extend only to private parties, and not to the King; nor can the interest of the King be severed from that of the informer, till after the debt is levied, and in the hands of the sheriff.

Baynham insisted, that the judgment was entered severally for each, and that the interest was thus severed by the judgment, and not by the execution only.

[*373] *Lord MANSFIELD, C. J.—I don't see how it is possible to bring this case within the act. Must the defendant part with his whole substance to the plaintiff for his one moiety? Must the Crown be left totally destitute? Not one of the provisions in the act can apply to the case of the Crown. These acts have had a very long existence; and there is no precedent in this Court of a discharge on a *qui tam* action, which is a strong reason for disallowing it now. I apprehend, there is no severance of interest between the King and the informer, till the levying of the sum upon execution; and then the sheriff severs it.

DENNISON, J.—You may enter judgment, either jointly or severally, for the whole penalty or for the distinct moieties; but the more regular way is to enter it jointly for the whole.

FOSTER, J.—Same opinion.

WILMOT, J.—It is clearly the suit of the informer, till execution; he may be nonsuited: and also the privilege of an attorney has been allowed to take place in these actions; neither of which could happen, were it looked upon as the suit of the Crown (*f*).

Rule, for discharging the defendant from the informer's moiety, discharged by the whole Court (*g*).

(*f*) *Scot v. Knapton*, T. Raym. 275; *Baker v. Duncalfe*, 3 Lev. 398, Lutw. 196; *Kirkham v. Whealey*, Salk. 30, 1 Ld. Raym. 27, Comb. 319; *Wilkinson v. Allot*, 1 Cowp. 366.

(*g*) But a person convicted upon an in-

dictment for an assault, who is directed by the award of the King's coroner to pay so much for costs, and so much for compensation to the prosecutor, is entitled to his discharge, under 32 Geo. 2; *R. v. Watfield*, 13 East, 190.

BIRD v. RANDALL.

S. C. 3 Burr. 1345.

No action lies for seducing a servant after recovery of a penalty under articles from the servant deposed.

BURFORD entered into articles with Bird, to serve him in the silk manufacture for five years, and to work at the usual hours. Bird articted to employ and pay him wages, and they mutually bound themselves in the penalty of 100*l.* to perform these articles. Randall seduced Burford from Bird's service; upon which, he brought his action against Burford for the penalty, which he recovered and received the 29th of March, 1761. And the present action was upon the case, as of Hilary term last, against Randall, for seducing the plaintiff's ser-

vant(h). Verdict for the plaintiff, damages 20*l.*, subject to the opinion of the Court.

**Ashhurst*, for the defendant, argued, that the action would not lie, there being no injury to the plaintiff: that Burford had a right to leave the plaintiff's service; and if so, it was no wrong in the defendant to seduce him. By inserting a penalty in the articles, each party has estimated the injury which might accrue by the breach of the agreement. Burford might have tendered the penalty, and left the service. Had he left the service first, and the plaintiff had received the 100*l.* afterwards, that would have been a waiver of the injury. A recovery by judgment, as in the present case, amounts to the same thing, being equivalent to tender and acceptance. The plaintiff is therefore satisfied for whatever damage and injury he sustained by the loss of Burford. What the case would have been, if he had brought his action against Burford on the covenant, and not for the penalty, is now immaterial. But having made his election, he is now bound by it, and can bring no action to recover any farther satisfaction.

Stowe, for the plaintiff.—This defence, being *res inter alios acta*, ought to have been pleaded. The articles still subsist. It is not said, that on payment of the 100*l.*, the articles should be void.

LORD MANSFIELD, C. J.—The true question is, whether the penalty was intended as a stipulated alternative for the whole of the covenant, in the nature of stated damages. I desire to hear another argument.

DENNISON, J.—At common law, if a plaintiff recovers for a penalty, he can't maintain an action of covenant afterwards. The question is, if judgment be recovered for the penalty, whether it is not an entire satisfaction for the whole articles; or whether the plaintiff can have two satisfactions for the same injury (i). Suppose an action on debt on bond, and judgment for the plaintiff; and a rescue or escape happens; and afterwards the debt and costs are paid: no action lies for the rescue or escape, for the plaintiff has received a satisfaction.

FOSTER, J.—Suppose a recovery had on an action of covenant, for ploughing up meadow ground, at so much *per acre*, as is usual in leases; can an action of waste be afterwards brought for the same injury?

*WILMOT, J.—The plaintiff had his election, to bring covenant or debt for the penalty (k). He has chosen to bring debt, and cannot now resort back to the covenant. My doubt is this: the action against Burford, taken either way, is an action upon contract: but the present action is upon a *tort ex de*

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(h) So an action lies against a person for continuing to employ the servant of another, after notice, without enticing him away; *Blake v. Lanyon*, 6 T. R. 221. And the master may waive the tort, and bring an action of *assumpsit* for the work and labour done by his apprentice against the person wrongfully employing him;

Lightly v. Clouston, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191. See a note of Mr. Hargrave's on this subject, Co. Lit. 117 a, n. (1).

(i) See Com. Dig. *Action*, (I, K, L), and *Hitchin v. Campbell*, *post*, 331.

(k) *S. P. Winter v. Trimmer*, *post*, 395.

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licto, vel ex quasi delicto. It was formerly held, that an indictment would lie for the seduction, but the contrary is now settled (*l*). Yet still the action lies for the wrong done. For this wrong there was an action vested in the plaintiff, at the time of the seduction committed: what has now taken it out of him?

DENNISON, J.—This action is for damages brought by the *same* plaintiff, who has already had a satisfaction for those damages against a third person (*m*).

WILMOT, J.—Though it be the same person, yet he has received satisfaction *diverso intuitu*; for breach of contract, not as an atonement for the offence.

[Post, 387, S. C.]

(*l*) *Reg. v. Daniel*, 1 Salk. 380, 6 Mod. 99, 182; cited also in 2 Ld. Raym. 1116; see *R. v. Higgins*, 2 East, 7, 8, 13, *arguendo*.

(*m*) In an action on the case for a deceitful representation of the credit of A., in consequence of which the plaintiff furnished him goods, it was objected to the competency of A., when offered as a witness for the plaintiff, that if they recovered, they would receive satisfaction for the debt due to them from A., and as, in consequence of the verdict, he would not be liable to an action for the price of the goods, he would be swearing in his own

discharge. But Lord *Ellenborough*, C. J., observed—"How can this record be evidence for him in another action? I am aware of the case of *Bird v. Randall*; but I do not think that A. has any interest in the event of this suit;" *Richardson v. Smith*, 1 Camp. 277. In an action against A. B. for adultery committed with the plaintiff's wife, it is no bar, that the plaintiff has also sued C. D., and charged him in execution, for adultery committed with her about the same period; *Gregson v. M'Taggart*, 1d. 418. This latter case indeed is distinguishable, for there these were two distinct injuries.

EGGLETON v. SMART.

S. C. Say. Costs, 168.

In replevin, no judgment as in case of a nonsuit for not trying the cause.

IN replevin: *M'Phedris* moved for judgment as in case of a nonsuit (*n*), for not proceeding to trial. *Eyre* shewed for cause, that as both plaintiff and defendant in replevin are considered as actors, either of them may carry down the cause to trial; and that if defendant gives notice and does not go on to trial, the rule of the Court is to give costs against him. That, in the present case, no notice has been given by the plaintiff; and that there is no instance of this act of Parliament being carried into practice in actions of replevin. In reply, a case out of *Barnes* (*o*), was cited on behalf of the defendant. But by the whole Court: The statute has never yet been extended to actions of replevin in this Court, and therefore

Let the rule be discharged (*p*).

(*n*) Under 14 G. 2, c. 17, s. 1.

(*o*) *Bentley v. Scott*, *Barnes*, 317 (8vo edit.).

(*p*) *S. P. Jones v. Concannon*, 3 T. R. 661; and the practice is the same in C. P.; *Shortridge v. Hiern*, 5 T. R. 400.

HERON v. HERON.

DEFENDANT obtained a rule for time to plead, pleading issuably, rejoining *gratis*, and taking short notice of trial.— Afterwards, the defendant pleaded a judgment in the Court of Common Pleas, upon which the plaintiff signed judgment: and now defendant moved to set aside this judgment for irregularity. But it being proved by affidavit, that the plea was in fact a false plea, the Court held, that this was not an issuable plea, within the meaning of the rule for time; and therefore discharged the rule for setting aside the judgment, with costs (q).

A judgment in Common Pleas no issuable plea (when false in fact), within the meaning of a rule for time.

(q) *S. P. Longfield v. Jackson*, 2 Wils. 117; *Cave v. Aaron*, 3 Wils. 33: see also *Hartley v. Hodson*, 1 B. Mo. 431.

MOLYNEUX v. SCOTT.

TRESPASS, for taking the plaintiff's cattle. The defendant justifies, as being a distress for the arrears of an annuity of 25*l.* *per annum*, devised to him by Thomas Molyneux, Esq. deceased, and charged on lands in Lancashire. The defendant was many years a menial servant to Mr. Molyneux, who, in a codicil to his will, dated 20th May, 1755, devised the said annuity to him and his assigns for the term of his natural life, with a power of distress for non-payment. And then, after several other bequests, he gives to the said defendant all his wearing apparel, and then adds, "And I do hereby direct, that the said William Scott shall not have any wages for his service for the time he shall serve my said son or my wife after my death, by reason of the said annuity herein before given him." The plaintiff replies, that after Mr. Molyneux's death the defendant continued in the service of his wife and son for a short time only, and then departed of his own accord without their consent. To which replication the defendant demurred, and plaintiff joined in demurrer.

Devise of an annuity for life, and a direction that the annuitant shall receive no wages after the testator's death, do not imply a condition that the annuitant shall continue in service.

Wallace, for the defendant, insisted, that this was an absolute annuity in the former part of the codicil, and that there is nothing in the latter clause to make it conditional. No service is imposed on the annuitant; the testator only meant, that *he should not enjoy the annuity and wages too; for being a yearly servant he must continue in the family to the end of his year, and would thereby be entitled to wages: to prevent which the testator directs, that he shall have no wages for the time that shall elapse after his death. Any other construction would impose a servitude for life. And it is remarkable, that many other bequests intervene between the gift of the annuity, and the supposed condition.

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Yates, for the plaintiff, argued, that in wills no precise formality is requisite to create a condition; it is sufficient, if the intent of the testator appears; and then the Court will enforce the condition, however unconnected the clauses from which it

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is collected. The words "*by reason of the said annuity*" in the second clause create a conditional bequest. An annuity to one, *quod præstaret consilium*, held to be conditional; Co. Litt. 204 a. Devise to A. "*and that he should be chaplain*" held to create a condition; Plowden, 412, *Scholastica's Case*. If the defendant does not perform the direction, he fails in the condition, for which the annuity was granted; *viz.* that he should serve without any wages.

Lord MANSFIELD, C. J.—I had no doubt upon the first reading of this codicil, nor have any now. The intent of wills is certainly to be gathered from the whole taken together. No precise form of words is necessary; but the intent of the testator must be carried into execution, if found to be agreeable to law. This intent must be collected from what are called *necessary* implications, or, more properly, from such as are *probable*. The true construction of wills is the same in a Court of law and a Court of equity. In all wills, there is a tacit condition annexed, both in law and equity, that whoever would derive a benefit under a will, must acquiesce in the whole of it, however disjointed the parts (*r*). Having laid down these general rules, let us now consider the present case. If from the words of the will or codicil any intent should appear, that the defendant should live on with the testator's wife and son, I should hold it to be clearly *conditional. But no such intention appears. The codicil is drawn with legal assistance and advice, as plainly appears on the face of it. The annuity is a gift to *his own* old servant; not one who was about the person of his son, which might have been an inducement for

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(*r*). An object of the testator's bounty shall not acquiesce in and admit the validity of the will by taking a benefit to himself under a disposition contained in it, and at the same time insist upon a claim adverse to and inconsistent with the intention of the testator, but to which he may have a legal right: he shall not adopt it as to that part, which is beneficial to himself, and repudiate it as to other parts, but shall make his *election*, whether he will take under the will and relinquish his claim adverse to it, or do the contrary. Where the testator disposes of the estate of another person, who has some interest given him by the will, such person shall not take that interest, unless he gives up his estate to the same amount. See *Whistler v. Webster*, 2 Ves. J. 387; *Ward v. Baugh*, 4 Ves. J. 623; *Wollen v. Tanner*, 5 Ves. J. 218. The doctrine of election was very much discussed in the case of *Theilsson v. Woodford*, 13 Ves. J. 209. There Lord Erskine, C. (p. 220), clearly lays down the principle of it—"The jurisdiction exercised by the Court of Chancery, compelling election, may be thus described:—A person shall not claim an interest under an instrument without giving full effect to that instrument as far as he can. If, there-

fore, a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition, that he shall not take both; and the consequence follows, that there must be an election; for though the mistake of testator cannot affect the property of another person, yet that person shall not take the testator's property, unless in the manner intended by the testator."

So though a devise to the heir is inoperative, for he takes by his better title, that is, by descent (*ante*, pp. 22, 187), yet it shall put him to his election between the property so devised to him and his claims adverse to the will; *Welby v. Welby*, 2 Ves. & Beam. 187.

See also *Blake v. Bunbury*, 4 Bro. C. C. 21, and Mr. Eden's note there, wherein all the modern cases on the subject of election are referred to.

the testator's desiring him to stay there. The gift is to him and *his assigns*, to enable him to sell it if he pleased, which it would be impossible to do, if it were defeasible, whenever he absented himself. The words, "*for the time he shall serve*," prove to me, that the servant had his option, and was not compellable to stay, under pain of forfeiting his annuity. Besides, *25l. per annum* is not an equivalent for wages, board-wages, and clothes; all which might be withheld under this direction of the codicil. On these circumstances of the case, and a full consideration of the whole of the codicil, I ground my opinion; and not on the want of any technical words, or formal arrangement of clauses.

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DENNISON, FOSTER, WILMOT, Js., of the same opinion.

Judgment for the defendant.

THE KING v. HARRIS, Alderman of Gloucester, and Others.

S. C. 3 Burr. 1330.

AN information was filed against the defendants, for malpractices relating to the admission of freemen in the city of Gloucester, previous to the late general election in 1761. The prosecutors now moved to enter a suggestion (s) on the roll, that a fair trial could not be had in the county of the city of Gloucester, and for an award thereupon, that the trial should be had in a neighbouring county, *vis.* the county of Gloucester at large. Affidavits were read to prove, that all the aldermen, sheriffs, and coroners, were interested on the one side or the other, so that a fair jury could not be returned. On the other hand a list was produced (verified by affidavit), of near six hundred persons qualified to serve as jurors, above eighty of which were non-freemen; and a special jury was already moved for in this cause, and granted.

Evidence of partiality must be extremely strong, to change the place of trial in a criminal information.

*For the defendant was cited the *King and Burton*, Trin. [*379] 27 and 28 Geo. 2, in which, the Court would not change the venue from the town to the county of Nottingham for the trial of an information for a false return to a *mandamus* for filling up the corporation; notwithstanding an affidavit made by the defendant, that all the burgesses were interested in the question of civil right, and that forty-eight Jurors could not be impanelled without including some of the burgesses.

For the prosecutors were cited, the Mayor of *Poole and Bennet*, Trin. 4 Geo. 2, Stra. 874(t), where the venue was changed, because the corporation was interested in the cause: and the *King and Norwich*, Clift's Entr. 741, where such a suggestion was entered on the roll, as now moved for, which is the more regular way: and the motion was rejected in the *King and Burton*, because it was to change the venue and not to enter a suggestion. And in the *King and Gamon*, about

(s) See the form of such suggestion in 1 Wils. 298; *R. v. St. Mary on the Hill*, 7 T. R. 735, and *Mylock v. Saladine*, post, 480.

(t) See also Mayor of *Bristol v. Procter*,

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three years ago, a *certiorari* was granted to remove an indictment from Glamorganshire, on an affidavit, that an impartial trial could not be had there^(v).

Lord MANSFIELD, C. J.—The motions are very different, to change the venue, which is saying, that the cause of action or indictment arose elsewhere; and, as in the present case, to continue the same venue, and by a suggestion on the roll to have a trial in another county. For though a fair trial can't be had in the proper county, yet the venue still remains to direct the Court in their choice of a neighbouring county, where a fair trial may be had. However, as such a suggestion when once entered cannot be traversed, we must be satisfied, that there is not a possibility of a fair trial in the proper county. And I don't think, that the imputation of partiality is clearly made out at present. There is no point of interest now to be tried; nothing that can be a leading precedent for the future. The crime to be tried is, the not having admitted freemen in due time to vote at the last election. The city will rather be interested against the defendant than for him. When a special jury is to be struck by the officer of this Court in the presence of the parties, the sheriff or other returning officer is a mere cypher^(u). And *yet the affidavit here goes only to the partiality of the return. And had it sworn generally, that the citizens were all partial, yet it gives no reasons nor facts from which that opinion is formed. The rule must be discharged.

DENNISON, J., of the same opinion.—The Court never enters suggestions on the roll but upon the clearest proof of facts, or else from some matter arising on the face of the record.

FOSTER, J., and WILMOT, J., of the same opinion.

(v) S. P. R. v. *Lewis*, 2 Stra. 704; R. v. *Cowle*, 2 Burr. 861; R. v. *Inh. of Clace*, 4 Burr. 2456.

(u) As to the mode of striking a special jury, see R. v. *Edmonds*, 4 B. & A. 471, 484.

THE KING v. PITT and MEAD.

S. C. 3 Burr. 1335.

Informations for bribery at common law should be cautiously granted, since the additional penalties by statute.

THE defendants were convicted on an information at common law for bribery at the last general election at Ilchester; Pitt being the bribing agent, and Mead the voter bribed. And being brought up this Term for the judgment of the Court, a doubt was started from the Bench, what judgment the Court could or ought to give upon the present prosecution; it being within the time of limitation^(w) (viz. two years) established by statute 2 Geo. 2, c. 24^(x), which inflicts a penalty of 500*l.* to be recovered by any common informer; and enacts, that, after judgment had against the defendant, or his "being *any other-wise* lawfully convicted of bribery, &c. in elections," he shall

(w) In one case, the Court respited the sentence till after the expiration of the time limited for bringing an action; R. v. *Heydon*, 3 Burr. 1359. And see R. v.

Heydon, post, 404.

(x) S. 11; explained by 9 G. 2, c. 38, and amended by 49 G. 3, c. 118.

incur a disability of voting and enjoying any franchise in a borough. Whereupon, the Court directed it to be argued at the bar; and it was accordingly argued by

Norton, Solicitor-General, *Morton* and *Thurlow*, for the defendants, that this Court can give no judgment; because, 1. The jurisdiction of the Court to grant informations for bribery in parliamentary elections was taken up upon trust, and is warranted by no principle of law. In the *Abingdon Cases*, 1754, the original rule was against one Spinage for bribery in the election of a Mayor, which being a common law *franchise was certainly right. The next was hastily granted against Mr. Thrale for bribery in the election of a member, but was made up and came to nothing. Afterwards, in the *Berwick Cases*, the rule was taken up equally hastily, and was founded upon a false induction. Because bribery in the election of a corporate officer had been punished by information, it was argued, that *a fortiori* it should be so punished in elections of members of Parliament. But this was not a just consequence; because, 2. Though bribery in parliamentary elections was always punishable at common law, yet till 1754 it was never punished by information in this Court. It was cognizable in the high Court of Parliament, in the House of Commons, by the *lex Parliamenti*, and not elsewhere, or by any other law. This Court has nothing to do with any proceedings at elections to serve in Parliament. There is not an instance in the books or records, wherein election bribery has been punished here, though the practice is very ancient. In 4 Inst. 23, it appears, that one Long, of Westbury, was fined by the House of Commons for bribery; and they have inflicted fines in other cases, as upon one Arthur Hall, for publishing a pamphlet that reflected on the House, 4 Inst. 23. 3dly, Supposing this Court to have a jurisdiction, yet no judgment can be given on this record. *Nemo bis punitur pro eodem delicto*; and yet, if judgment be now given, the defendant may be punished twice, if any common informer thinks proper to bring an action for the 500*l.*, on the recovery of which a disability is also consequent. 4thly, If any judgment can be given, it can only be the same that the Court has given in a similar case, *K. and Luckup*, T. 9 Geo. 2, Stra. 1048: information upon stat. 9 Anne, c. 14, against gaming, to recover the quintuple value. On conviction the Court thought they could give no other judgment than *ideo convictus*, and leave the informer to recover the forfeiture by an action on the judgment. The reason is the same in both cases. So in perjury, which is an offence at common law, when new penalties were superadded by the statute of Elizabeth, though there is a particular provision therein, that nothing in that act should stop any proceeding at common law; yet it was never known, that a prosecution was carried on upon both the common law and the statute. 5thly, No judgment can *here be given, but what must interfere with the statute penalties. The Legislature therefore meant, that this penalty chalked out by the statute should be the whole of

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the punishment inflicted, and be recovered by that method only, which is there pointed out by Parliament.

LORD MANSFIELD, C. J.—The statute of 9 Anne is levelled at two species of offences; one, which was a crime at common law, that of deceitful gaming; the other, which was not so,—winning more than 10*l.* at a sitting. Probably the conviction of Luckup was for that, which was no crime at common law, and then the Court could certainly give no other judgment.

DENNISON, J.—I was counsel for Luckup. The prosecutor, finding it difficult to prove a fraud, had recourse to the other clause for winning above 10*l.*

WILMOT, J.—In my note of the *King* and *Luckup*, Lord *Hardwicke* expressly took notice, that the information was not for any fraudulent winning.

Davy and *Burland*, Serjeants, and *Popham*, for the prosecutors, argued,—1. That, where an offence is punished by a special statute, the common law punishment is not thereby taken away; 2 Hal. P. C. 191. By stat. West. 1, c. 20, *De Malefactoribus in Parcis*, a statute penalty is inflicted. But Lord Coke in his Comment holds, 2 Inst. (y), that the common law remedy is not superseded thereby. *Q. and Orbell*, 6 Mod. 42; an indictment was allowed for cheating in a foot-race, notwithstanding it was within the time of limitation for bringing an action, as appears by searching the record. *K. and Stanton*, 2 Show. 30; information for cutting down the banks of the river Wye, for which special remedies are provided by a stat. 5 Eliz: and argued thereupon, that the information would not lie; but the Court held otherwise, and gave judgment for the King. *K. and Dixon*, 10 Mod. 336, indictment for keeping a gaming-house, for which, by stat. 33 Hen. 8, a penalty is inflicted: held, that the indictment at common law was not ousted by this statute. 2. That this is an offence, whereof this Court has criminal cognizance.

[*383] *And by Lord Mansfield, C. J.—We are well satisfied as to that, so that you need not argue it. (And note, the argument of the exclusive cognizance of the House of Commons was only urged by *Norton*, Solicitor-General).

3. The Legislature, if it pleases, may say, that a man shall be twice punished for the same offence. The statute intended the new penalties as cumulative over and above the common law punishment. There are no negative words to annihilate the justice of the common law. And it is held, *Salk.* 460; 1 Hawk. P. C. 178(x), that affirmative statutes, which inflict new penalties, are cumulative, and do not oust the common law remedies.

Afterwards, in the same Term, Lord MANSFIELD, C. J., delivered the opinion of the Court.—We are very glad this case has been solemnly argued, in order to shew the ground upon which informations of this kind have been granted. Whatever effect it may have upon the present case, it will certainly

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Bribery at parliamentary elections still punishable at common law.

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And supposed to continue so by the statute.

Judgment for bribery at elections.

be of use hereafter to make the consequences of thus interposing more fully considered. Upon search it appears, that, since the stat. 2 Geo. 2, no informations for bribery at parliamentary elections were ever granted till about the general election in 1754. The practice was begun by a mistake. It was taken for granted, that the Case of the *King* and *Spinage* at Abingdon was conclusive to this species of bribery also, which it certainly was not. We have no doubt, but that bribery at elections, taken generally, was always and is still punishable at common law. But it did not follow of course, that the Court is obliged, *ex debito justitiæ*, to grant informations for bribery at elections of members since the making of the statute, 2 Geo. 2, which inflicts such very severe penalties. The first *Abingdon* Case was for bribery in the election of a mayor; an offence for which there was no extraordinary remedy provided by statute. In the second case, the *King* and *Thrale*, it was too hastily concluded, that if an information was proper to go for the one, it was much more proper for the other, which is a * still greater offence. I am confident, that if that case had been fully considered and argued, the Court would have required a very special case before they would have granted the information. When I came here, I thought it a settled point, and that if the fact appeared, the information had always gone of course. The first case in my time was the *Windsor* Case. That also went off. And the present is the first that was ever prosecuted to effect; which has brought on the present difficulty of giving judgment, which must immediately have occurred before, if ever any criminal had been before brought up for judgment. As it is, the Court will certainly hereafter lay a great stress on the circumstances which have now occurred, in future motions for informations of the like kind (a). We have not the least doubt but that the offence, notwithstanding the statute, still remains an offence at common law. It is proper it should remain so, to prevent a collusion; that this offence, which is of deep malignity, may be prosecuted at the suit of the King for the public benefit; the statute remedy being only recoverable at the suit of a private informer. The statute itself supposes it to remain punishable at common law by the words, "*or any otherwise lawfully convicted*," which refer to some other proceedings than those which the statute has pointed out. Whether the Court will ever hereafter grant informations for this offence, till the time of limitation is expired, will be matter of future consideration. There may sometimes be very good reasons for granting them (b); but the Court for the future will exert their discretion only upon very particular circumstances, and when the case is well considered. For the present case, the Court has an eye to the penalties which may hereafter be recovered in the punishment now set:—Which was six months imprisonment for the agent, Pitt; and three months for Mead, the voter.

(a) See *R. v. Robinson*, post, 541.

(b) See *ante*, 294, n. (c).

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S. C. Bull. N. P. 236.

Correspondent
sufficient evi-
dence to dis-
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prove a man's
hand, though he
has never seen
him write.

IN the trial of an issue out of Chancery, before Lord *Mansfield*, C. J., at the Sittings in Middlesex after Term, it was disputed, whether the name of one William Jones sub^scribed to a declaration of trust was genuine; and, to prove the hand-writing forged, a witness was produced, who had frequently corresponded with Jones, but had never seen him write. And, upon debate, Lord *Mansfield* held him to be a good evidence, and his testimony was accordingly admitted (c).

(c) It appears from the report in Bull. N. P., that Jones was a person residing abroad: and in an action on a bond, where to prove payment a receipt was produced, but the hand-writing of the person signing it was only proved by a witness who had received letters from him, but had never seen him write; and it was contended on the authority of this case, that such evidence was sufficient; *Buller, J.*, said, "that was only because the writer lived abroad, and so that persons, who had seen him write, were out of the reach of a *sub-pœna*;" and he rejected the evidence; *Willis v. Singer*, Supp. Vin. Abr. *Evidence* (T. b. 48). But this distinction, it seems, does not exist; for, in general, where it

can be satisfactorily proved that the person, whose hand-writing is in question, in fact wrote letters received by a correspondent, that is, where the identity of the person is established, such correspondent is a good witness to prove the hand-writing, although he never saw him write; *Lord Ferrers v. Shirley*, Fittg. 195; there indeed *Probyn, J.* thought, that this method of proof would only apply in cases where the party resided abroad; but *Ld. Raymond* would not allow the distinction; *Layser's Ca.*, 6 Harg. St. Tr. 279. See *Stark. Evid. P. iv*, 651; *Wade v. Broughton*, 3 Ves. & B. 172; *R. v. Cator*, 4 Esp. N. P. C. 117; *Gurney v. Langlands*, 5 B. & A. 330.

MORRISON v. KELLY.

No copy of acquittal need be granted by the Court, to found an action for a malicious prosecution, except in case of felony.

AT the Sittings in Middlesex after Term, this action came on to be tried, being for a malicious prosecution in indicting the plaintiff for keeping a disorderly house. To prove the fact, the clerk of the peace for the Westminster Sessions attended with the original record of the acquittal.

Norton, Solicitor-General, objected, that there ought to be a copy of the record granted by the Court, before which the acquittal is had, in order to ground an action for a malicious prosecution. But it was ruled by Lord *Mansfield*, that though this is necessary, where the party is indicted for felony (d), yet the practice is otherwise in case of misdemeanors (e).

(d) *Holt, C. J.*, laid it down, that a prisoner in a case of felony cannot have a copy of the record of acquittal, without leave of the Judge; *Groenvelt v. Burrell*, 1 Ld. Raym. 253: and by an order made 16 C. II, at the Old Bailey, no copies of any indictment for felony shall be given without special order; "for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the King upon just occasions;" *Kelyng. 3*, pl. 7; 3 Bla. Comm. 126 *acc.*; *Brangan's*

Ca., 1 Leach, Cr. Ca. 27, *A. D.* 1742, *contra*; where *Willes, C. J.*, said, "that by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it." If a copy of an indictment for felony be surreptitiously obtained without an order from the Court, or *stat* of the Attorney-General, it will be admitted in evidence; *Leggatt v. Tollervey*, 14 East, 302; *Jordan v. Lewis*, Id. 305, n. (a), 2 Stra. 1122, *S. C.* So a prisoner is not

entitled to a copy of his indictment in order to prepare a plea of *autrefois acquit*; but the Court will direct it to be read over slowly; *Vandercomb's Ca.*, 2 Leach, Cr. Ca. 711.

By 7 W. 3, c. 3, s. 1, persons indicted for high treason or misprision thereof shall, at their own expence, have a copy of the indictment delivered to them, five days at least before their trial, to enable them to make their defence. And by 60 Geo. 3 and 1 Geo. 4, c. 4, s. 8, in prosecutions

for misdemeanors by the Attorney or Solicitor-General, the party prosecuted shall have a copy of the indictment free of expence.

(c) *S. P. Evans v. Phillips*, 2 Selw. N. P. 952, (ed. 1812). So a defendant is entitled to a copy of a conviction by a magistrate, in order to defend himself against an action for the same offence; *R. v. Midlam*, 3 Burr. 1720. See also *Home v. Bentinck*, 2 Brod. & B. 130, 146; 4 J. B. Mo. 563, S. C.; and *R. v. Dr. Parnell*, ante, 39, n. (f).

MORRISON
&
KELLY.

MICH. TERM,—3 GEO. III. 1762.—K. B.

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THE KING v. WARD.

NORTON, Solicitor-General, moved for a *habeas corpus* to Mrs. Ward, to bring in the body of Elizabeth Vernon, an infant under twenty-one, who had eloped from her father, and lived at Mrs. Ward's house, who was her aunt, and was suspected to be going to Scotland, with the privity of Mrs. Ward, in order to marry an Irish officer; Mrs. Ward having not only refused to restore Miss Vernon to her father, but also kept her from him by force.

Habeas corpus for detaining a child under age from her father, and rule for information *mis*.

Per Lord MANSFIELD, C. J., *et Cur.*—Take your *habeas corpus*, and let Mrs. Ward shew cause why an information should not be filed against her (a).

(a) See *Mash's Ca.*, post, 805; *Warman's Ca.*, post, 1204.

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CUST moved for a new trial. It appeared, that Mary Jerom, the prosecutrix, was a quaker; but, being less rigid than the rest of her sect, the brethren, according to their usual discipline, first admonished her for frequenting balls and concerts; then sent deputies to her, and lastly expelled her; and entered as a reason in their books, "For not practising the duty of self-denial." This was signed by the defendant, their clerk. The prosecutrix sent her maid for a copy of the entry, which was delivered to her by the defendant, and was the only act of publication proved. She thereupon moved the Court for an information for a libel, which was denied: *whereupon she preferred an indictment, which was found at Nottingham Sessions, and removed into B. R. by *certiorari*, and tried at last Nottingham Assizes before Mr. Justice Clive, who left it to the jury, and they brought in the defendant guilty. It was argued to be irregular to leave it at all to the

Expulsion from a quaker's meeting, and reasons assigned in their books, not a libel.

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v.
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jury, upon such an evidence only of publication; 5 Mod. 167 (b). But as the Judge was dissatisfied with the verdict, the whole transaction being merely a piece of discipline (in which the Court strongly concurred), they for that reason granted the new trial, in the first instance, without any rule to shew cause; Serjeant *Hewit* having attended to watch the motion on the part of the prosecutrix, and confessed the dissatisfaction of Justice *Clive* at the verdict(c).

(b) It was fully considered what acts amount to a publication, in *R. v. Burdett*, 4 B. & A. 95, where all the authorities are

referred to. See *Baldwin v. Elphinstone*, post, 1037.

(c) Bac. Abr. *Libel*, (A) 2.

BIRD v. RANDALL. (S. C. Ante, 373.)

No action lies for seducing a servant from his master, who has paid the penalty stipulated by his articles for leaving him.

THIS case was again argued by *Norton*, Solicitor-General, for plaintiff, and *Morton* for defendant, who argued, that if this action would lie, actions would lie for seduction during the whole time originally specified in the articles, and yet nobody can be now guilty of seduction, as the service is at an end by agreement. And he cited, Cro. Eliz. 237; Hutt. 98; *Cock* and *Jenner*, Hob. 66.

Lord MANSFIELD, C. J.—There are two questions in this case; 1st. Whether in case the 100*l.* had been actually paid to the plaintiff before the commencement of this action, he could then have maintained it. 2dly. Whether the payment of it after the commencement of this action, and before the trial, makes any, and what, difference.

1st. In respect to the first, we must consider the true construction of all articles guarded with a penalty. Upon these there are two remedies to be pursued at the option of the party injured. He may, as often as the articles are broken, have *toties quoties* an equitable relief upon the footing of the articles themselves, for a partial breach of contract. If the servant absents himself a week or a month, the master may recover a proportionable satisfaction in damages. But there is besides another remedy given *in terrorem*, by way of punishment, beyond the value of the injury done, and *therefore called a penalty. It carries with it a more than equitable satisfaction given to the party, who will rigorously insist upon it. This gives rise to many suits in equity, to relieve against the penalty. And when equity considers it only as a security to enforce the performance of the thing, it will relieve against it;—when, as a rigorous punishment, it will not then interpose. But when a man once takes the penalty, he totally discharges the other party from any future obligation, and has recovered all that he can ever claim under the articles. The articles are gone, and absolutely determined. In the present case the master has elected the penalty; the servant cannot return again; and therefore there is a total end of the articles as between the master and servant. As to the seduction, a bare solicitation to

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leave the master is doubtless no cause of action. It is the actual injury sustained, that grounds the suit. For the servant may be unable to pay the damages, and therefore the law subjects the seducer. But here there is no injury remaining: The whole is done away by the exaction of the penalty: Otherwise, it would be adding to the penalty beyond the agreement of the parties. The penalty is the stated ground. Whoever takes another man's servant under fetters, always estimates what he must pay for the purchase of such service, and virtually deducts it out of the servant's wages. He computes, that without paying such a penalty he could afford to give the servant more; if he pays it, he must give him less. Therefore, we are all clear of opinion, that, if the 100*l.* had been paid before the action brought, no action could possibly lie against the present defendant.

2dly. As to the second point: There is no analogy between this case and actions upon trespasses or joint contracts. Trespassers are all equally principals. In joint contracts all are bound to answer *in solidum*, and the party may take out execution against one only, and have only one satisfaction. They are also formal precise actions, which are *stricti juris*. This is an action upon the case, which I have often observed is almost equivalent to a bill in equity. Whatever appears upon the trial that takes away *the equity, will take away the remedy (*d*). The plaintiff must recover out of the justice of his case. As at the trial it appeared that the money had been paid, therefore the action appeared to have been brought

In actions on the case, satisfaction made to the plaintiff pending the suit will take away his remedy.

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(*d*) A matter of defence arising after the commencement of the action, and before plea pleaded, cannot be taken advantage of on the general issue; and if pleaded, it cannot be pleaded generally with a prayer of judgment, "if the plaintiff ought to have or maintain his action;" but it should be pleaded in the nature of a plea *puis darrein continuance*, and pray judgment, "if he ought further to maintain his action:" if such matter arises after plea pleaded, then it is the subject of a plea *puis darrein continuance*. For *actio non* goes to the commencement of the action, and not to the time of pleading: though the contrary was held by *Ld. Mansfield* in *Sullivan v. Montague*, 1 Doug. 106. A plea of set-off, that the plaintiff was indebted at the time of the plea pleaded is bad; it should state, that he was indebted at the commencement of the action: and *Buller, J.*, said, that a judgment recovered after action brought and before plea pleaded, could not be pleaded by way of set-off; *Evans v. Prosser*, 3 T.R. 186. If a plaintiff become alien enemy after the commencement of the action, but before plea pleaded, that fact ought to be taken advantage of, in strictness, by a plea in the nature of a plea *puis darrein continuance*; *Le Bret v. Papillon*, 4 East, 502: but in

that case, the Court, looking at the whole record, gave judgment for the defendant. Yet a bankrupt's certificate, allowed after the filing of the plaintiff's bill, and before plea pleaded, is evidence to support the general plea of bankruptcy, *i. e.* where the bankruptcy arises before action brought; *Harris v. James*, 9 East, 82.—See also *Kinnear v. Tarrant*, 15 East, 622; *Tower v. Cameron*, 6 East, 413, as to pleading bankruptcy. Where the provisional assignee of a bankrupt's estate commenced an action, and the estate was then assigned by him to new assignees after the issuing of the *latitat*, but before declaration, and the defendant pleaded the general issue; it was held that such assignment was no answer to the action upon that plea: but the Court intimated that it might have been pleaded specially. And *Abbott, C. J.*, said: "The rule is, that the plaintiff shall recover, where the general issue only is pleaded, if it appear that he had a cause of action at the time of issuing the writ;" *Page v. Bauer*, 4 B. & A. 345. So coverture arising after the writ issued cannot be given in evidence, but must be pleaded in abatement; *Morgan v. Painter*, 6 T.R. 265. See also *Hull v. Pickersgill*, 1 Brod. & B. 282; 3 B. Mo. 612, *S. C.*

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against conscience. There was a collusion in the lying by. After judgment against Burford, before he receives the money, he brings his action against Randall; and after having brought the action, then he receives the money. Suppose a man brings an action on the case for goods sold, and two days after bringing it he receives the money; I should have no doubt, if this appeared at the trial, that he should not recover. We are all therefore of opinion, that this circumstance has made no difference in the case. The Court, on motion, would have stopped the action (e), on shewing the money paid.

Postea delivered to the defendant, with

Judgment of nonsuit thereupon.

(e) Where A. & B. recovered in separate actions for libel, against two persons concerned in the same publication; and then commenced fresh actions against the same parties, each suing that party against

whom the other had recovered in the former, the Court would not interfere in a summary way, to stay the latter proceedings; *Martin v. Kennedy*, 2 Bos. & P. 69.

The GOVERNOR and COMPANY for smelting Lead v. RICHARDSON and Others.

S. C. 3 Burr. 1341.

Lead mines not
rateable to the
poor.

TRESPASS for taking their goods. On not guilty pleaded, verdict for plaintiffs on this special case: That plaintiffs were lessees of certain lead-mines in Aldstone in Cumberland under Greenwich Hospital, rendering for rent a certain portion of the ore acquired. The mines were worked by their servants, but the plaintiffs never resided in Aldstone. That for six years past the profits to Greenwich Hospital were, at an average, 1900*l. per annum*; but the profits to the adventurers were casual and uncertain, nor did it appear on the trial whether they made any profits or not. That lead-mines, in the north of England, have never been rated to the poor till three or four years ago, when a few were rated. That the poor have increased in this parish by means of working the said mines. That a rate was made at Christmas, 1760, in which the plaintiffs were assessed, and refused payment; whereupon a distress was made, for which this action was brought against the overseers, and the justices who granted the warrant. The question upon the whole was, whether the plaintiffs were liable, in respect of the said lead-mines, to be rated to the relief of the poor.

[* 390] * *Morton* for defendants argued, that coal-mines, which are expressly named in stat. 43 Eliz. as rateable to the poor, are put for example only, and intended to extend to other property of a similar nature (f).

But by the Court, Lord MANSFIELD, C. J.—The question only lies upon the occupation under the statute: inhabitancy is out of the case. If any species of property is omitted out of the statute, the Court cannot extend it on reasons or arguments

(f) See 1 M. & S. 616, per Lord Ellenborough.

ab inconvenienti. It must depend on the words of the statute, which only mentions coal-mines (g). If it had not meant to except others, it would have said in general, "mines." There might be a reason, why the Legislature might only name coal-mines. Other mines are of a peculiar nature, and governed by particular laws. The occupier of mines is quite different from the owner of the soil; and there is a difference between the bare worker under ground, and the lessee of land in which mines may be situated. Such lessee may certainly be rated in respect of the land. In Cornwall there never was a supposition that mines are rateable.

DENNISON, J., *accord*. FOSTER, absent.

WILMOT, J.—In stat. 31 Eliz. (h) as to cottages, the act specifies cottages erected near coal-mines, and other mineral works; which shews, that when other mines are intended to be included, they are particularly mentioned.

Postea delivered to the plaintiffs (i).

(g) A coal mine becoming unproductive, and ceasing to be worked, is not rateable, although the lessee be bound still to pay the reserved rent; *R. v. Bedworth*, 8 East, 387. But it is rateable although worked at a loss; *R. v. Parrot*, 5 T. R. 593.

(h) C. 7, s. 4.

(i) See the observations of *Lawrence, J.*, on this case, in 2 East, 167. So iron mines are not rateable; *R. v. Cunningham*, 5 East, 478. But the lessee under the Crown of lead mines, is rateable for the profits from lot and cope, which are duties paid him by the adventurer without any risk to him; *Rowls v. Gell*, 2 Cowp. 451. So are persons entitled to toll-tin and farm-tin, for the same reason; *R. v. St. Agnes*, 3 T. R. 480. So are the lessees of the lord of the manor's lot, toll, or free-share of calamine; *R. v. Baptist Mill Comp.* 1 M. & S. 612; as occupiers of land, though not actually resident. So where the owner of the soil reserved one-eighth share of tin,

tin-ore, &c., the same being picked, made merchantable, and fit to be smelted, to be paid in ore or in money, and he had received it in money: he was held liable to be rated for this eighth share as an occupier of land, conformably to the cases of *Rowls v. Gell*, and *R. v. Baptist Mill Company*; *R. v. St. Austell*, 5 B. & A. 693, 1 D. & R. 351. But a non-resident lessor of lead mines is not rateable for the rent, whatever question might arise as to a certain quantity of ore reserved; *R. v. Bishop of Rochester*, 12 East, 353; *R. v. Welbank*, 4 M. & S. 222, 8 P. Neither is the owner of lead ore rateable in respect of duty-lead reserved in a lease, being one-fifth of the lead to be smelted from the ore, the reservation being considered in the nature of a rent; *R. v. Earl of Pomfret*, 5 M. & S. 139, where *Ld. Ellenborough* delivered an elaborate judgment upon the rateability of mines. But lime-works, *R. v. Alibury*, 1 East, 534; and slate-works, *R. v. Woodland*, 2 East, 164, are rateable.

LEAD COMP.
v.
RICHARDSON.

PRICE v. NEAL.

S. C. 3 Burr. 1354.

CASE for money had and received for plaintiff's use: On *non assumpsit* pleaded, verdict for plaintiff on this special case.

A bill of 40*l.* was drawn in the name of one Sutton on the plaintiff, dated 22d November, 1760, which in the course of trade was indorsed to the defendant for a valuable consideration, and notice of it left at plaintiff's house the day it became due. Plaintiff sent his servant to take up the bill, who did so, and paid the money. A second bill was drawn, *1st February, 1761, on plaintiff, in the same name, which plaintiff accepted, and wrote an order thereon for his banker

Drawee of a forged bill who accepts and pays, or pays it only, cannot recover back against the payee.

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to pay it (*k*); and being so accepted, it was indorsed to the defendant for a valuable consideration, and was paid by such order of the plaintiff. It appeared afterwards, that both bills were forged by one Lee, who was since hanged for other forgeries. The defendant acted innocently and *bonâ fide*, without the least privity or suspicion, and paid the full value of both bills. The question was, whether the plaintiff can recover back from the defendant the money paid on the said bills or either of them.

The counsel for the plaintiff gave up the accepted bill, on the authority of *Jenys and Fowler*, Tr. 2 Geo. 2, Stra. 946, where it is held, that proof of forgery shall not be admitted on behalf of the acceptor of a bill, because it would hurt the negotiation of paper credit; unless a difference could be allowed as to the admission of evidence on a trial, and the determining the law, after the fact is settled (*l*). As to the first bill, which was never accepted, they insisted the case was different. No credit had been given to that bill by an acceptance; therefore the same inconvenience would not follow.

Per Cur.—This is an action for money had and received; the *condictio indebiti* in the Roman law (*m*); the most liberal species of actions on the case. If a man pays money *bonâ fide* due, after the statute of limitation has run upon it, or pays money fairly won at play, it will not lie to recover it back. It will lie if paid on a mistake, or without consideration, and the like. In the present case, nobody knows the hand of the drawer but the plaintiff. The first bill is taken up by him; the second is accepted by him, before it comes to the defendant. The negligence in the plaintiff is greater than can possibly be imputed to the defendant. Where the loss has fallen, there it must lie. One innocent man must not relieve himself by throwing it on another (*n*).

Postea delivered to the defendant, with judgment of nonsuit.

(*k*) See stat. 1 & 2 G. 4, c. 78.

(*l*) "When a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged:" *per Buller, J.* in *Smith v. Chester*, 1 T. R. 654. So where an acceptor, on a bill being shewn to him, and being asked, whether the acceptance was his hand-writing,

said that it was, he cannot afterwards set up as a defence, that the acceptance so written was a forgery; *Leach v. Buchanan*, 4 Esp. 226.—See Bayley on Bills, 217 (ed. 1813).

(*m*) *Ante*, 220.

(*n*) This decision was recognised by *Buller, J.*, 2 Doug. 640. See *Moses v. Macpherson*, *ante*, 219; *Farmer v. Arundel*, *post*, 824; *Jaques v. Golightly*, *post*, 1073.

On information for conspiracy, the fact of conspiring need not be proved, but may be collected

THE defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost, that conversed by knocking and scratching in a place called Cock-lane. When they were brought up for

judgment, Lord *Mansfield*, who tried the information, declared, that he had directed the jury, that there was no occasion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances (o); and should be glad to know the opinion of his brethren, whether he was right in such direction. *Quod nemo negavit.*

Judgment respited till next Term. [*Post*, 401, S. C.]

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from other circumstances.

(o) So where the defendants had severally bribed the prosecutor's apprentices to put grease into his cards, he being a card-maker, their being all of one family, and concerned in card-making, was held evidence of a conspiracy; *R. v. Cope*, 1 Stra. 144. If a banker permit money to be lodged with him, to be paid over for corruptly procuring an appointment, he may be indicted for a conspiracy along with those who are to procure the appointment; *R. v. Pollman*, 2 Camp. 233. "If a general conspiracy exist, you may go into general evidence of its nature, and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it, years after those terms have been established, and who may re-

side at a great distance from the place where the general plan is carried on:" per Lord *Kenyon*, in *R. v. Hammond*, 2 Esp. N. P. C. 718. So on an indictment against certain persons for conspiring to cause themselves to be believed to be persons of substance, evidence may be given of various instances of false representation; for, as Lord *Ellenborough* observed, it is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence; *R. v. Roberts*, 1 Camp. 399. And see *R. v. Robinson*, 1 Leach C. C. 37; *R. v. De Berenger*, 3 M. & S. 67; *R. v. Henry Hunt*, 3 B. & A. 566; *R. v. Rispal*, ante, 368.

TROTT, who as well, &c. v. WELCH and SWANN.

S. C. 3 Burr. 1357.

ACTION for 200*l.* by a custom-house officer against the defendant, for having prohibited goods in his custody, upon stat. 26 Geo. 2, c. 21, s. 3, and a subsequent proviso, s. 7, "That if the officer neglects or refuses to prosecute with effect, within one month, any common informer may." Defendant pleads a judgment recovered against him by a common informer. Plaintiff replies (by protestation, that this was a covinous judgment) that he brought his action within a month after condemnation of the goods. Demurrer and joinder therein. *N. B.* The seizure was the 2d of May; the information the 22d; the condemnation on the 13th of November.

Limitation of action to one month in stat. 26 Geo. 2, c. 21, for prohibited goods, must be after condemnation, provided due diligence be used.

The Court held it to be very clear, that the month mentioned in the statute must be referred to the time of condemnation, provided due diligence be used by the officer in laying the information, which he had done in the present case. This attaches the right of action in himself. By any other construction the statute would be shamefully evaded.

Judgment for the plaintiff.

HUNT v. Cox.

S. C. 3 Burr. 1360.

Scire facias against bail may be sued out after a *ca. sa.* is returned, though not regularly filed; and the shortness of notice to the bail is immaterial.

A *Scire facias* was sued out against the defendant's bail, *viz.* Milner and Miles, tested June 23d, and returnable June 30. It was left at the sheriff's office the 25th of June, and the same day a warrant issued: but it was not served on Milner till the 29th in the evening, and not on Miles till the 30th, being the last day in Term. No *ca. sa.* was returned and filed in the office till after 1st July, as in strictness it ought to be, before any proceedings are had against the bail. The bail surrendered their principal after the rising of the Court (*p*), on the last day of the Term, *viz.* June the 30th. And now Morton moved, that an *exoneretur* might be entered on the bail-piece, and proceedings stayed against the bail.

Norton, Solicitor-General, shewed for cause; that a return of *scire feci*, or two nichils, on *scire facias*, was a sufficient ground to proceed against the bail. If the Court should enquire into length of notice, &c. motions of this sort would be infinite. On the 18th of June, a *non est inventus* was returned on the *ca. sa.*, and lodged in the office. If duly lodged, it may be filed at any time. In strictness, the bail ought to render the principal immediately after the judgment: but, in favour of bail, it has become the practice to sue out a *ca. sa.* first, in order to shew that the plaintiff means to proceed against the body rather than the land or goods. This *ca. sa.* is the proper notice to the bail, though they have till the return of the *scire facias* to bring in the principal. The filing of the return is immaterial, being only for the satisfaction of the Court. Had the bail pleaded this matter (as they ought to have done, and not brought it on in this summary way by motion), we might have filed it before replication, and then have replied it (*q*). In *Wyke and Satchwell* (*r*), the bail of *Moravia*, P. 21 Geo. 2, a motion similar to the present; *Lutw.* 1273, was cited to shew, that no *scire facias* can issue till the *ca. sa.* is returned; but in that case, it being returned in due time, and being regularly lodged with the sheriff, though not actually filed, the Court declared, that such omission of filing was not an irregularity sufficient to set aside the proceedings.

[*394] * Lord MANSFIELD, C. J.—The filing is mere matter of form.

DENNISON, J.—The practice has been long settled. The

(*p*) In K. B. by bill, the bail should surrender the principal before the rising of the Court, on the return day of the second *scire facias*, or of the first, where it is returned; *Wilmore v. Clerk*, 1 Ld. Raym. 156; *Anon.* 6 Mod. 238; *Anon.* 8 Mod. 340: and by original or in C. P. on the *quarto die post, sedente curia*; *Simmonds v. Middleton*, 1 Wils. 270; *Bailey v. Smeathman*, 4 Burr. 2134; *Derisley v. Deland*, Barnes, 82; *Lardner v. Bassage*,

2 H. Bla. 593. And in C. P. the Court ordered the hour of the day or true time of the surrender to be entered by the filacer, that it might appear, whether the surrender was made before or after the rising of the Court; *Ling v. Woodyer*, Barnes, 69.

(*q*) But see *Dudley v. Stokes*, post, 1183.

(*r*) Perhaps *Barr v. Satchwell*, 2 Stra. 813.

ca. sa. must lie so long in the office. Both the return and the filing are mere matter of form. If we were once to alter these matters of form, it would unsettle all the practice.

WILMOT, J.—If we were to go into affidavits of the time of notice, it would be endless. The presumption of law is, that the bail always have the principal in custody, ready to surrender him when the plaintiff signifies his demand of him. The necessity of suing out a *ca. sa.* is, only to demonstrate the plaintiff's election of what process he chooses to pursue. The bail are to use due diligence, and learn that election in the proper office (*s*).

Rule discharged, with costs.

(*s*) It is the settled practice of K. B. that if the bail be summoned any time before the rising of the Court on the return day of the writ, it is sufficient to fix them; *Clarke v. Bradshaw*, 1 East, 86,

where the case of *Webb v. Harvey*, 2 T. R. 757, is corrected; *ib.* 88. See also *Wright v. Page*, *post*, 837—Tidd's Pr. 308, 1161, (ed. 1821).

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v.
COX.

FREEMAN v. HYETT.

ACTION for money due for a parcel of cloth. *Dunning* moved to stay the trial of the cause, in order to send a commission into Portugal to establish a fact by way of set-off; *viz.* That in a former parcel of cloths sent to Portugal, and bought of the same plaintiff, it appeared, on opening the bale, that they were burnt in the pressing, which had greatly lowered their value.

Damages not yet recovered cannot be set off.

Norton, Solicitor-General, objected, that the set-off was not maintainable. You might as well set off the damages which you are entitled to recover for a battery: you should bring your special action on the case.

And of that opinion was the Court, and denied the motion (*t*).

(*t*) Uncertain damages cannot be the subject of set-off; *Howlet v. Strickland*, 1 Cowp. 56; *Weigall v. Waters*, 6 T. R. 488; *Gillet v. Mawman*, 1 Taunt. 137; *Crawford v. Stirling*, 4 Esp. 207: neither can the penalty of a bond; *Neddriffe v. Hogan*, 2 Burr. 1024. Where the condition of a bond is to pay an annuity, the

arrears of such annuity may be set off; *Collins v. Collins*, 2 Burr. 820: or if it be conditioned for the payment of liquidated damages, they may be set off; *Fletcher v. Dyche*, 2 T. R. 32. See *Dowland v. Thompson*, *post*, 910, and Com. Dig. *Pleader* (3 G 17).

The KING v. PETER ANNET.

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DEFENDANT was convicted on an information for writing a most blasphemous libel in weekly papers, called the Free Enquirer; to which he pleaded guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years old, and some symptoms of wildness that appeared on his inspection in Court; the Court declared they had mitigated their intended sentence to the following, *viz.* To be imprisoned in Newgate for a month; to stand twice in the pillory, with a paper on his forehead, in-

Judgment for blasphemy.

THE KING
v.
ANNET.

scribed *Blasphemy*; to be sent to the house of correction to hard labour for a year; to pay a fine of 6s. 8d.; and to find security, himself in 100*l.* and two sureties in 50*l.* each, for his good behaviour during life (v).

(v) *R. v. R. Carlisle*, 3 B. & A. 161.

Sessions has no original jurisdiction over Overseers' accounts.

THE KING v. THE OVERSEERS OF PORTSMOUTH.

THE Overseers of Portsmouth, on behalf of themselves and the rest of the parishioners, appealed to the Borough Sessions against the accounts of the late Overseers; which coming on to be heard at Easter Sessions, 1762, the Court made several orders thereupon, to which several exceptions were taken; and upon the first of them, *viz.* that the Sessions has no *original* jurisdiction relating to Overseers' accounts, the Court quashed the orders of Sessions; though it was alleged that the orders were founded not on 43 Eliz., but on 17 Geo. 2, c. 38 (u).

(u) Which last statute is amended by 50 G. 3, c. 49, by which it is enacted, s. 1, that overseers and churchwardens shall submit their accounts to two or more justices residing near the place, who have power to administer an oath to them, and to strike out and disallow charges they deem unfounded, &c., and if the overseers, &c., neglect to submit their accounts, or to verify the same, or to deliver over to their

successors any goods, &c., the justices may commit them till they comply; and if they neglect to pay over arrearages, the succeeding overseers may levy the same by distress; and in default of distress, such justices may commit till payment. By s. 2. an appeal to Sessions is given to the overseers, &c. Decisions on this stat.—*Lester's Ca.*, 16 East, 374; *R. v. Pascoe*, 2 M. & S. 343; *R. v. Bird*, 2 B. & A. 522.

SITTINGS AFTER TERM.—LONDON.

WINTER v. TRIMMER.

One may recover more than the penalty of a charterparty in damages, by action on the case [* 396] for breach of contract.

MORTON argued, that where there is a special penalty in a charterparty, you cannot recover more than that penalty in an action on the case for breach of the contract; and cited 1 Chan. Cases, 226; 1 Vern. 350.

* *Norton*, Solicitor-General, *contra*:—That, where there is a penalty and covenants in the same deed, the party has his election either to bring debt for the penalty or action on the covenant for damages.

Lord MANSFIELD, C. J.—In the case between the master and servant, last Term (w), it was determined, that you may either receive the penalty and rescind the contract, or bring action on the covenants and let the contract stand (x).

Verdict against *Morton's* client, the defendant.

(w) *Bird v. Randall*, ante, 373, 387.

(x) S. P. per Lord Mansfield, in *Lowe v. Peers*, 4 Burr. 2228. On the authority of the principal case it was decided, that where a memorandum of charter-party contained an agreement to perform certain

things, with a certain penalty for non-performance, damages might be recovered in *assumpsit* for breach of the contract beyond the amount of the penalty; *Harrison v. Wright*, 13 East, 343.

GLOVER v. BLACK.

S. C. 3 Burr. 1394.

ACTION on a policy of insurance. Glover had lent money to Captain Tryon of the Denham India-man on a *respondentia* bond, but insured as for *goods*. Captain Tryon had interest on board equal to the sum insured. The ship was burnt, and her cargo. And now the question was, whether an insurance as for *goods and merchandise* should be valid as for a *respondentia* interest. *N. B.* Captain Tryon was admitted to prove his own interest; though excepted to.

Insurance upon goods is valid for a *respondentia* interest.

[So held at *Nisi Prius*, but the contrary decided on a case reserved: *post*, 422.]

Lord MANSFIELD, C. J., held it to be a sufficient interest in the goods; and that a mortgagee of goods might insure those goods. The statute 19 Geo. 2(y), has prohibited the captain (or borrower) from insuring any thing, but the surplus above his *respondentia* bonds. Who must insure the rest? The lender. No fraud can be meant in this case, by not expressing that it was on *respondentia*; since it is more for the benefit of the insurers to omit, than to mention it;—"Because, *ut opinor*, in insurances upon *respondentia*, proof of the execution of the *respondentia* bond is sufficient proof of interest in the insured."

[S. C. *Post*, pp. 399, 405, 422.]

(y) C. 37, s. 5.

HILARY TERM,—3 GEO. III. 1763.—K. B.

[397]

The KING v. MORGAN and Others.

IN an action of trespass, but not *vi et armis* (a), in order to remove a cause commenced in the Court Baron of a gentleman in Wales, the defendant brought his writ of *tolt*, directed to the steward, to remove the said action into the County Court of the sheriff of Monmouthshire; which the said Morgan refused, and afterwards tried it in the Court Baron, and the jury found for the plaintiff, and gave 6s. 6d. damages.

[A writ of *tolt* is not to be directed to the steward of the Court Baron. *Semble*, that a defendant cannot have such writ without cause shewn in the body of it.]

Norton, Solicitor-General, moved for an attachment against the plaintiff and the steward, for their contempt.

Upon the whole, the principal question was, Whether the defendant could bring such a writ, or at least, without shewing any cause in the body of it. Both which *Morton* for the plaintiff denied, and quoted F. N. B. 7, and the Register 5(b).

(a) A Court Baron cannot hold plea of trespass *vi et armis*, inasmuch, as not being a court of record, it cannot impose a fine; nor a plea, if the debt or damages amount to forty shillings; Co. Lit. 118 a; 2 Inst. 311: but, it seems, it may hold plea in either case by *justicias*; *Ibid*.

(b) Fitzherbert says: "It seems reasonable, that the tenant may also remove

the matter by a *Tolt* made by the sheriff, supposing that the bailiffs of the court do favour the demandant in the matter. *Tamen quære*; for the rule in the Register is, that the tenant may remove the plea out of the Lord's Court for good cause before the Justices in the Common Pleas: but the demandant cannot so do, because he may have a *Tolt* from the sheriff to remove it

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v.
MORGAN.

DENNISON, J.—The cause alleged in the writ is always imaginary and fictitious.

Morton replied,—But, Sir, some cause ought to be assigned on the face of the writ.—To which no answer was given.

[*398] *Ashhurst*, also for the plaintiff in the original cause, cited *Finch's Law*, 144, and objected, that the writ was misdirected, *for that it was directed to the steward, and not to the sheriff's summoning bailiff, according to the precedent in *Rastall's Ent.* 246(c); or, at least, that it ought to have been directed to the suitors, who are properly the judges in a Court Baron.

Norton replied, that the writ of *tolt* and the writ of *pone* are of one and the same nature, but applicable to different courts, and that the *pone* lies as well for the defendant as for the plaintiff. That the cause usually assigned in these writs is mere surplusage, and the direction is so too; for if the writ is properly executed, it is sufficient: and, that there are two sorts of Courts Baron; in the one, the suitors are the judges; in the other, the steward is, as it were, a judge together with the suitors.

After these arguments, Lord MANSFIELD, C. J., said—This motion is a motion of spirit and vexation. I am not satisfied, that this writ is a good writ. But there is no necessity to give a precise opinion; for, if the regularity of the writ is only doubtful, the court will not inflict any punishment.

DENNISON, J.—I will not give a precise opinion. By the common law, the suitors are the judges in a Court Baron: by a special custom, the steward may be judge (*d*). In the case at bar

out of the Lord's Court into the County Court." The words of the Register are: *Quia oportet, quod petens faciat totam de curia in comitatum, et exinde potest removeri ad sectam suam et poni coram Justitiariis de Banco, &c., sine causa.*

(c) There the proceedings were commenced by writ of right patent, and not by plaint, as in the present case. It is a precept from the sheriff to his own bailiff, commanding him, "*ex parte domini Regis, quod in propria persona tua accedas ad curiam, &c., et loquasur, quæ est in eddem curia per breve domini regis de recto patens inter &c., tollas, et illum habeas in comitatu meo apud N.*" The cause there alleged is, that the tenant "*est unus ballivorum, qui curiam prædictam tenet; per quod*" the demandants, who bring the *tolt*, "*rectum in curia illa consequi non possunt.*" The return is: "*Accessi in propria persona mea ad curiam, &c., et loquelas quæ fuit ibidem inter, &c., in comitatu vic' N. prædicti, &c., quæ quidem loquela patet in quodam schedulâ huic præcepto annexâ. Responsio J. S. ballivi itinerantis infrascripti.*" There is a similar precedent in *F. N. B.* 7, 4to. ed. [3 F]. Whence it appears, that in the case of a writ of right patent, at least, the writ of *tolt* could not be directed to the suitors. See *Com. Dig. Droit* (B 5).

(d) "The Court Baron is of two na-

tures. The first is by the common law, and is called a Court Baron, as some have said, for that it is the freeholder's or freeman's court, (for barons in one sense signify freemen), and this may be kept from three weeks to three weeks. The second is a Customary Court, and that doth concerne copholders, and therein the lord or his steward is the judge. Now as there can be no Court Baron without freeholders, so there cannot be this Customary Court without copholders or customary holders. And as there may be a Court Baron only of freeholders without copholders, and then is the steward the register; so there may be a Customary Court of copholders only without freeholders, and then is the lord or his steward the judge;" *Co. Lit.* 58 a; 4 *Inst.* 268, *acc.* That the suitors are the judges, whether the plea be by force of a writ of right or by plaint, see *Bro. Abr. Judges*, pl. 15; *Gentleman's Ca.*, 6 Rep. 11 b; *Pill v. Towers*, *Cro. Eliz.* 791; *Noy*, 20, *S. C.*; *Armyn v. Applestaff*, *Cro. Jac.* 582; *Eure v. Welle*, *T. Jon.* 22; *Lovel v. Goleston*, *Godb.* 68; *Baldwin v. Tudge*, 2 *Wils.* 20. "A common-law Court baron can only be held before two free suitors at the least, and not before the lord and his steward;" *per* *Ld. Kenyon*, C. J., in *Bradshaw v. Lawson*, 4 *T. R.* 446. So where in an action on a judgment recover-

I know not whether the suitors or the steward are the judge: but the common law ought to have the preference in a doubtful case. As to the rest, I am of the same opinion as my Lord Chief Justice.

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WILMOT, J.—I am of the same opinion, but not of a decisive one. I have always understood, that a defendant shall not bring a writ of *tolt* without cause: for the law will not permit the defendant to remove a plaint out of one court not of record, into another court not of record also; but by the writ of *pone*, he might remove it into a court of record, *vis.* the Common Bench; but it is difficult to assign a reason for the difference made between plaintiff and defendant, except that if the plaintiff is retarded in his suit in the Court Baron, and does not choose to go at once to the Courts at Westminster, he may remove his action into the County Court. The necessity of shewing cause was anciently, * for that the lord had the right to the profits and perquisites of his court; of which he shall not be ousted by the defendant without shewing good cause. At this day it is but matter of form. But I am clearly convinced, that the writ is misdirected; for it ought to have been directed to the suitors of the court, and not to the steward, who is only the prothonotary of the court (e).

[* 399]

The rule was discharged, but not with costs; on account of the doubt concerning the validity of the writ.

ed in a Court Baron, it appeared to have been holden before the steward, the plaintiff was nonsuited; *Rumsey v. Walton*, cited *ibid.* And see the cases referred to in Bac. Abr. *Court Baron*. (e) As to the office and responsibility of the steward, see *Holroyd v. Breare*, 2 B. & A. 473.

GLOVER v. BLACK.

S. C. *Ante*, 396.

THE case being specially reserved, was argued, by *Yates*, for the plaintiff, and *Harvey*, for the defendant.

Yates argued (with whom Lord *Mansfield*, C. J., seemed to agree) that the not expressing the insurance to be on *respondentia*, was indeed for the benefit of the insurer; because the insurer, if goods are specified, is liable to pay general average; but nothing upon *respondentia*, unless upon a total loss. And the insured upon goods must prove an actual interest on board to recover against the insurer; whereas, upon *respondentia*, he proves his interest, by only proving the bond, by virtue of a special clause for that purpose in every insurance on *respondentia* bonds.

Harvey insisted, that if an insurance on goods entitled the insurer to recover on a *respondentia* interest, the insurer was liable to be defrauded. For suppose Captain Glover had lent money on *respondentia*.—He insures as for goods only. Now, if no goods are shipped on his account, but the ship comes home without any cargo consigned to him, he may (as no risk

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v.
BLACK.

[* 400]

was apparently run) demand back his premium. But if the ship be lost, as in fact it was, he may demand (as he now does) the insurance money on his *respondentia*. So that, by specifying [*goods*] (*f*) only, he has a chance to have his premium returned, and runs no hazard of losing his property in the *respondentia* bond, if what is now contended for be law.

*Lord MANSFIELD directed the case to stand over for farther argument, and desired the counsel to apply themselves particularly to the case of insurances on mortgages, and other liens upon goods.

[See *post*, p. 405, 422, S. C.]

(*f*) In the former edition this passage but the sense requires that the word should is, "by specifying *respondentia* only;" be "goods," and so it is in 3 Burr. 1398.

HOWARD v. JEMMET, Executor.

S. C. 3 Burr. 1368.

A bankrupt executor, pleading a false plea, after the commission issued, is liable to execution for costs, [notwithstanding he had obtained his certificate.]

JEMMET was executor of I. S. (who owed to Howard 220*l.* on bond) and administered all his effects, except about 23*l.* Afterwards, on 13th October, 1760, Jemmet became a bankrupt, and the effects, thus unadministered, fell into the hands of his assignees. In January, 1761, Howard brought this action of debt against Jemmet the executor. After which, Jemmet obtained his certificate, 6th March, 1761, which was confirmed the 9th of April following. But in the mean time he pleads *non est factum* to the bond, and at the Assizes subsequent to the certificate, but previous to the confirmation, the execution of the bond was proved, and a verdict for the plaintiff: Whereupon a judgment was entered up *de bonis testatoris* for the debt, and *de bonis propriis, si non, &c.* for the costs and damages. On the 27th of November, 1762, a *fieri facias* was sued out, and Jemmet's goods taken in execution. And now it was moved by Norton, Solicitor-General, to set aside the *fieri facias* and all proceedings thereon, as being irregular, and contrary to the stat. 5 Geo. 2, c. 30, s. 7, for the protection and indemnification of bankrupts (*g*).

He argued, that the principle upon which the statute discharges a bankrupt is, because he has then nothing to pay; and the law will not check his future industry by making his new acquired property liable. That the words in the statute are very general, "All debts owing when he became a bankrupt." There is an exception for those who have been bankrupt once before, but no other exception can be grafted upon the statute but that one which the Legislature has expressly specified. He acknowledged, that the plea of *non est factum* was ill advised, being upon a foolish notion, that the special matter might have been given in evidence; and perhaps was also calculated to gain time for procuring the certificate.

(*g*) By which it is enacted, that every bankrupt conforming shall be discharged from all debts by him due or owing at the time that he did become bankrupt.

HOWARD
v.
JEMMET.

* *Morton* and *Yates* shewed for cause, that this was a debt *en auter droit*, for which the plaintiff could not have come upon the bankrupt's effects, and that the statute only discharges such debts as might have been recovered against the bankrupt himself.

LORD MANSFIELD, C. J.—The statutes of bankrupts do not extend to effects, which the bankrupt may have *en auter droit* (h). The assignees have no right to interfere with them, if they can be specifically distinguished. The creditors of the testator cannot come in under the commission against the executor in the usual summary way; because their demand must depend upon the account to be taken of the assets. But they may come in by a more solemn method; by a bill in equity (i), stating the conversion of the assets to the bankrupt's use: And, in such case, the Court will order any *specific* assets to be distributed among the testator's creditors.—In the present case, here is a full administration of all but 23*l.*, which the assignees took too, among the rest of the defendant's property. He should have pleaded this, and disclosed the whole truth; not have pleaded a false plea, which it is, that gives the foundation of costs; and this plea being subsequent to the commission issued, there is therefore no colour for this rule.

FOSTER, DENNISON, Js., absent.

WILMOT, J.—At the time when the action was brought, the defendant was no debtor to Howard. He became so by the false plea; which amounts to contracting a new debt subsequent to the commission.

Rule to shew cause discharged (k).

(A) S. P. Ex parte *Ellis*, 1 Atk. 101; Ex parte *Marsh*, Id. 158; *Bennet v. Davis*, 2 P. Wms. 316; Ex parte *Llewellyn*, 1 Co. B. L. [137]; see also *R. v. Eggeston*, 1 T. R. 369.

(i) See Ex parte *Leach*, 2 Bro. C. C. 596, and Ex parte *Tupper*, 1 Rose, 179. A legatee may prove a vested legacy under the commission; *Walcot v. Hall*, 2 Bro. C. C. 305.

(k) As to the cases, wherein a bankrupt remains liable to costs, notwithstanding his certificate, see Ex parte *Hill*, 11 Ves. Jun. 646; *Walker v. Barnes*, 5 Taunt. 778, 1 Marsh. 346, S. C.; *Phillips v. Brown*, 6 T. R. 282; *Dinsdale v. Eames*, 2 Brod. & B. 8; S. C. 4 B. Mo. 350, where the cases are collected; and *Aylett v. Harford*, post, 1817.

THE KING v. PARSONS and Others.

S. C. Ante, 392.

THE defendants received judgment, *vis.* Richard Parsons (the father of the child, who was the principal agent in the pretended communication with a spirit, by supernatural noises, impossible in themselves to be interpreted, unless previously contrived and directed) to stand thrice in the pillory, and be imprisoned two years:—Elizabeth Parsons, the mother, to be imprisoned for one year:—and Mary Frazer, a servant, who was aiding and assisting, to be sent to the House of Correction, to hard labour, for six *months:—Moore, the curate of the parish, and one James, who were found guilty at the trial, were discharged, on paying the prosecutor 300*l.*, and his costs,

Judgment for
imposture and
conspiracy.

[*402]

THE KING
v.
PARSONS.

which amounted to near as much more.—Browne, who had published a narrative, and one Say, the printer of a newspaper, had previously made their peace with the prosecutor.

EASTER TERM,—3 GEO. III. 1762.—K. B.

MONCASTER v. WATSON.

S. C. 3 Burr. 1375.

A new inclosed common shall not be exempted from *specific* tithes, from which the lands to which it was appurtenant were exempted before the inclosure.

SPECIAL case from the last Assizes at York. Plaintiff was impropriator of A.—defendant's lands in A., called Swarland Demesne, had been immemorially exempt from paying tithes of corn, grain, and hay. In 1753, an act passed for inclosing a common, in which the defendant had common of pasture, appurtenant to Swarland Demesne; in lieu of which, he had several allotments of ground, which he now claimed to be exempted from said tithes, as partaking of the nature of the original estate, to which the common was appurtenant.

Wallace, for the defendant, cited *Stockwell* and *Terry* (a), in Chancery, 15 July, 1748, wherein Lord *Hardwicke* allowed such an exemption to take place, in certain new inclosed lands at Dummer in Hants.

Thurlow, for the plaintiff, observed, that in that case the exemption claimed was from *all* tithe; in the present, for certain *specific* tithes. All other tithes are to be paid in kind; as for lambs, wool, agistments, &c.; at least it must be so [*403] *presumed, as no exemption is claimed for them. These were the natural tithes of the common, and the inclosure shall not confer an exemption which the land had not before. Lord *Hardwicke's* decree was founded on the private act of Parliament for inclosure, to which the parson was a party, which was equivalent to the agreement of the parties. The impropriator is no party to the act for inclosing the common new in question.

Lord MANSFIELD, C. J.—In *Stockwell* and *Terry*, the prescription was, to be exempted from all tithes of Grange Farm and its appurtenances, in consideration of a *modus* of 15s. The appurtenances were therefore covered by the *modus*, when uninclosed; and afterwards, when they came to be inclosed and ploughed, they were covered still. But here the prescription is for tithe of corn, grain, and hay on a certain spot of land called Swarland Demesne. There is no prescription for any exemption from other tithes. The common therefore always was unexempted, and continues unexempted still (b).

(a) 1 Ves. Sen. 115.

(b) By a grant of all tithes "arising out of or in respect of farms, lands," &c. the tithes arising out of and in respect of rights of common appurtenant to such farms or

lands will pass; Lord *Guyard* v. *Fosker*, 7 T. R. 641; S. C. 3 Eagle & Y. 470. So, where A. had purchased an estate free from rectorial tithes, with a right of common thereto annexed, which common

WILMOT, J.—My only doubt is, whether (as by this act of Parliament the new allotments are made liable to all the same charges and incumbrances as the old land was) such new allotments will not, by this construction, be made liable to the modus (viz. the repairs of the church, which are chargeable on Swarland Demesne) and the tithe too (c).

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v.
WATSON.

DENNISON, J.—I should much doubt, whether the act, by the word "charge," could mean to include such a burthen as this: if it should, it is by the defendant's own agreement.

WILMOT, J.—Perhaps the word "charges," being coupled with incumbrances, is only equivalent to it, and means no more than debts, jointures, mortgages, &c. But this is my only doubt, and indeed of no great weight. The principal question is extremely plain. It differs from *Stockwell* and *Terry* materially: there, the new inclosed lands were always exempted; here, never exempted before. Lord *Hardwicke* therefore properly determined, that the exemption should continue after inclosure; and upon the same principle we must determine, that the lands now in question shall continue liable.

Judgment for the plaintiff.

was afterwards inclosed under an act of Parliament, and certain land was allotted to A. in lieu of his said right of common; it was held, that no tithe was payable in respect of the allotted land. *Abbott, C. J.*—"This case is very distinguishable from *Moncaister v. Watson*; for the land, in respect of which the allotment was there made, was not wholly free from the payment of tithe: the exemption claimed was merely from the tithe of corn, grain, and

hay, neither of which the common, while uninclosed, was capable of producing. The tithe of agistment would therefore remain payable notwithstanding the exemption;" *Steele v. Manns*, 5 B. & A. 22; 3 C. 3 Eagle & Y. 1065.

(c) "The modus was confined to the demesne lands, and did not extend or affect to extend to the common;" per Lord *Kenyon*, 7 T. R. 651.

THE KING v. HEYDON. (*Ante*, 351, 356.)

[404]

S. C. 3 Burr. 1387.

THE defendant was convicted at the Assizes for bribery; and it was now moved to postpone judgment, till an indictment, which he had preferred against one *Burbage*, for perjury in his evidence, was determined.

Witness indicted for perjury not a reason to postpone judgment against the person convicted.

Norton, Solicitor-General, and *Morton* shewed for cause, that this was a motion of the first impression, and of very dangerous consequence, merely to delay justice: that the perjury assigned in the indictment is not in respect of the fact for which Heydon is convicted, but a collateral circumstance: that *Burbage* offered to take his trial immediately after the indictment found, but the defendant refused to consent to it: that the witnesses on this indictment for perjury were all examined (one only excepted) on the information for bribery.

Lord **MANSFIELD, C. J.**—I am clear, that Heydon can be no witness in this case, if they mean by this indictment to alleviate the judgment of the Court for the bribery; because he is swearing in his own cause. And the witnesses on the indictment having all been previously examined at the former trial makes

THE KING
v.
HEYDON.

Judgment for
bribery.

an end of this motion; for their credit has already been weighed by a jury, and found wanting. Therefore let the defendant stand committed till Saturday, April 30.

Afterwards, the Court gave judgment on him, to be imprisoned three months, and pay a fine of 200*l*.

ROWE v. HASLAND.

In making a
[title by] pedi-
gree, evidence
that a man has
not been heard
of many years is
sufficient evi-
[* 405]
dence *prima*
facie to prove
him dead with-
out issue.

IN ejectment, evidence was given, that one James Hasland, a poor labouring man, was living at Liverpool about sixty years ago, whose title, or that of his issue (if living), would supersede the title of the plaintiff's lessor. Five witnesses deposed that they believed he was dead without issue, but knew nothing for certain. The plaintiff produced the register of * Waltham, to shew one James Hasland buried in 1707; but this plainly appeared to have been altered from Harrox, but by whom, or where, did not appear. *Clive*, J., who tried it at the last Northern Assizes, left it to the jury, whether Hasland was dead without issue. The jury thought so, and gave a verdict for the plaintiff, with which the Judge reported himself satisfied.

Defendant now moved for a new trial, as contrary to evidence.

Lord MANSFIELD, C. J.—In establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew, that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. Many persons go to the East and West Indies, and are never heard of again. What is done on such a trial is no injury to the man or to his issue, if he should afterwards appear and claim the estate. I am therefore satisfied with the Judge's direction, and with the verdict, upon the reason of it, as well as upon the Judge's authority (*d*).

Rule discharged.

(*d*) "According to the statute 19 C. 2, c. 6, with respect to leases dependent on lives, and also according to the statute of bigamy, 1 J. 1, c. 11, the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living;" per Lord Ellenborough in *Doe v. Jesson*, 6 East, 85; which principle is recognised in *Doe dem. Lloyd v. Deakin*, 4 B. & A. 433, where it was decided, that the fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is *prima facie* evidence of his death. See also *Doe dem. Banning v. Griffin*, 15 East, 293. Under a plea of coverture, where it appeared that the defendant's husband went abroad twelve

years ago; it was held, that the defendant was bound to prove that he was alive within seven years: but the production of letters written by him to his friends within that period, was held sufficient proof; *Hopewell v. De Piana*, 2 Camp. 113.—There the fact of the party not having been heard of for seven years raised a presumption, that he was dead, which it is for the other party to rebut. But if it appear, that he has been heard of within that period, and the issue is on the life or death of the person, the proof lies on the party asserting the death; for the presumption is, that the party continues alive, till the contrary be shewn, either by direct proof, or by facts which raise the presumption of his being dead; *Wilson v. Hodges*, 2 East, 312. See Vin. Abr. *Absence* (B); *Evidence* (T. b. 87); Stark. Evid. P. iv, 1120.

GLOVER v. BLACK.

S. C. *Ante*, 399.

THIS case was again argued by *Morton*, for the plaintiff, and *Norton*, Solicitor-General, for the defendant.

Morton insisted, that the *respondentia* creditor has an interest in the goods: a pledge without a deposit:—*pecunia trajectitia*, as called by Maleyne, *Lex Mercat.* c. 31. He trades at the peril of the sea; the voyage is an adventure at his hazard. The *respondentia* interest is therefore a merchandize, and the insurance is upon *goods* and *merchandise*. As to frauds that are suggested to be consequent on this doctrine, the Court will not adopt the supposition of a possible fraud, where none has actually happened. And as to the case put of *demanding a return of premium, (in the last argument), it cannot happen in this case; because no person can ship goods in the India trade, but on the Company's account. By stat. 19 Geo. 2, c. 37, s. 5, no insurer on *respondentia* shall be answerable for more than the value of the insured's interest in the ship or goods; and if the goods, &c. do not amount to the value of the sum lent thereon, the borrower shall be responsible to the lender for so much of the money lent, as he hath not laid out on the ship and merchandize, together with the insurance, &c., notwithstanding the said ship, &c. be totally lost. Hence I argue, that *respondentia* interest is insurable, *eo nomine*, as goods; because one is made the measure of the other. And the insurer always considers *respondentia* as goods, because he allows the bond itself to be the only proof of interest necessary, and never enquires after the value of the goods on board. [*406]

Norton, Solicitor-General, observed, that in every India ship there is always a private adventure; and Captain Glover had certainly one in the case at bar. *Respondentia* interest must always be insured *nominatim* and specifically; because it is in itself no general or special property, no interest in the goods at all. The contract does not enable the lender to proceed against any part of those goods; he cannot attach them, if the borrower be insolvent; he has no remedy *in rem*, but *in personam* only. This distinguishes this case from a mortgage; for in mortgages the thing is bound to pay the debt. As to fraud;—he who underwrites for *respondentia* does it for the whole voyage; he who underwrites for goods, runs no risk any longer than the goods remain undisposed of. But, whether more or less advantageous, is not the question: the underwriter should know what he insures; the insured should name it at the time, not upon after-thought, as he may like best. If *respondentia* cannot be insured so cheap as goods, that argument is decisive for us; if it can, then, in the name of honesty, why not name it? In all commercial countries there is a special form for insuring *respondentia*, *nominatim*. Would such a custom have *prevailed, unless the merchants had seen good reason for it? [*407]

GLOVER
v.
BLACK.

In no case before, has a policy for the one been allowed as valid for the other. And, as it never has been, so it never ought to be. You might, with equal propriety, confound an insurance on the ship and her freight, or with greater; that being more nearly allied than the present instance, it being the earnings of the ship. As to the argument drawn from the act of Parliament, the substantial purpose of it was, to prevent a gaming policy, as far as possible. Therefore it enacts, that the fund shall be equal to what is pretended in the *respondentia* bond. The admitting the bond to be sufficient proof of the interest is by private agreement, by a special clause in the policy, whereby the lender, who is insured, is not to contest this matter with the fraudulent borrower, but leaves the insurer to do it for him.

[See *S. C. post*, 422.]

BOND v. SEAWELL.

S. C. 3 Burr. 1773.

Qⁿ. If the attestation of a will of lands be valid, when the witnesses only see the last sheet of the will?

ISSUE to try the validity of Sir Thomas Chitty's will. On the trial, this special case was made:

Sir Thomas Chitty made his will, 20th March, 1762, all of his own hand-writing, upon two sheets of paper, wrote in folio pages on all sides, and signed at the bottom of each page. The sentences and words were so connected, from the bottom of each page to the top of the next (and particularly from the fourth side of the first sheet to the first side of the second sheet), that they were imperfect and nonsensical, if read apart, but clear and intelligible, when read together. He also made a codicil in like manner, on a single sheet. The testator then called in Francis Harding, shewed him both sheets of the will, and his signature to every page, told him that was his will, and also shewed him the codicil, and desired him to attest both, which he did on the last sheet of the will, and on the codicil, in the presence of the testator, and then left the room. John Vaughan and John Leyland came in immediately afterwards; the testator shewed them the codicil and the last sheet of the will, and sealed them in their presence, took each of them up, and severally delivered them as his act and deed. These witnesses then attested the same in the testator's presence, but never saw the first sheet of the will, nor was it produced to them, nor was the same or any other paper on the table. After the testator's death, both sheets were found in his bureau, not pinned together, but (with the codicil) wrapped up in one piece of paper.

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Quære, Whether this was a will duly executed, according to the statute to prevent frauds and perjuries?

Morton, for the plaintiff, argued in support of the will:—That in the last sheet there are no lands devised; therefore to that alone, no formal attestation was necessary; so that the testator must intend, that the attestation should relate to the first sheet: That no witness is expected to know the number

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of sheets or skins in a will; the statute gives no direction for that purpose. It is allowed, that the last sheet is well executed: the question is, what does that extend to? All is of the testator's writing, the context runs from one sheet to another; therefore he meant to publish his whole will; and declares that his intention in the last sheet. The last sheet is clearly valid; shall the first be bad? Suppose the mansion-house devised in the first sheet, and the out-houses in the second; would the Court separate them by this nicety of construction? In all trials, a witness is only shewn the last sheet upon which his attestation is signed, and by which only he knows the identity of the instrument. *Lea and Libb*, 3 Mod. 262, 1 Show. 68, 88, Comb. 174, Carth. 35; Reports temp. Holt, 742; Reports in Equ. 263, (relied on by the other side), [was] a will attested by two witnesses, [and] a codicil, reciting the will, attested by two witnesses also, one of whom was also a witness to the will: held not to be well executed. But that was the case of one complete instrument attested by an incompetent number, and of a co^dicil subsequent many months in date. [*409] We have three witnesses, who all attested the whole, that Sir Thomas Chitty meant to publish as his will at the same time. Suppose a will is made without any attestation; and afterwards, by a codicil, the testator refers to it, and confirms it, and has three witnesses to the codicil: this would be a good will (e). [In] *Molineux* and *Molineux*, Cro. Jac. 144, the question was, whether a man had made a good will in writing, under the statute of wills. He devised to his sons, "according to the intent expressed in certain other writings, therein mentioned." Court held it to be good by way of reference. By the same rule I now contend, that the first sheet of Sir Thomas Chitty's will is well attested, being in like manner referred to by the last, which is allowed to be indisputably good.

Yates, for the defendant, observed, that the question is not,

(e) It would not be a good will since the Statute of Frauds. The original will referred to by the codicil, must have been properly executed, for if it be bad in its inception, no codicil, though properly executed, can give effect to it. As where a testator devised lands by a will written in his own hand, but which had no witnesses, and then by a codicil, duly executed and subscribed by four witnesses, recited and took notice of it, it was held that the will was void; *Att.-Gen. v. Barnes*, 3 Vern. 597, Prec. in Ch. 270. In a leading case on the subject, this doctrine has been laid down, viz. that every codicil, referring to a previous duly executed will, unless confined in expression, is a republication of such will, though the codicil relate only to personal property; *Barnes v. Cross*, 1 Ves. Jun. 486, confirming the case of *Acherley v. Vernon*, 1 Com. R. 381; *Piggott v. Waller*, 7 Ves. Jun. 98, S. F. Lord *Hardwicke* seems to have been of the same

opinion in *Gibson v. Lord Montford*, 1 Ves. S. 492; and see *Potter v. Potter*, Id. 437; *Doe dem. Pate v. Davy*, 1 Cowp. 158. It was at one time thought, that an intention to republish should be manifestly declared or expressed; *Att.-Gen. v. Downing*, Ambler, 571. Whether a subsequent writing be considered as the conclusion of a will begun before, as in *Carleton v. Griffin*, 1 Burr. 549, or as a codicil republishing a will, it must be attested by three witnesses. Such republication, unless controlled, will pass after-purchased lands; *Piggott v. Waller*, *ubi supra*; *Lady Strathmore v. Brown*, 1 T. R. 482, confirmed in D. P., 2 Bos. & P. 500; *Goodtitle dem. Woodhouse v. Meredith*, 2 M. & S. 5: but it will not operate upon a thing which has come by substitution into the place of something existing at the time of publishing the will, but since withdrawn; *Holmes v. Coghill*, 7 Ves. Jun. 499; *Lane v. Wilkins*, 10 East, 241,

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whether the will is genuine, but whether duly published under the statute of frauds. And in support of a general law made for the security of devises, it is proper to go even against the intent of any particular testator. This statute has been always strictly interpreted; and the first sheet was never seen by two of the witnesses. Had the sheets lain one upon another, and been connected together, I allow it would be a good attestation, though the witnesses might never see the under ones. The law implies that they did see them, till the contrary appears; and if they saw but the extremest edge of the paper, it will be sufficient. But here there is a direct absolute negative. The witnesses have sworn, they did never see the first sheet. In *Lea and Libb*, as reported in 3 Mod. the Court put this very case *in terminis*, and held it no good attestation. The reason is, because the testator may afterwards substitute another sheet in the room of that he had first written; which, if proved, would clearly vitiate the will. The Case of *Molineux* and *Molineux* was only a question of description; and the Court very justly held, that the nature of the estate might well be described, by reference to another instrument.

[*410] **Morton*, in reply, observed, that a man might as easily change a sheet in his will for a new one, after he had shewn and published it as before; unless the witnesses must subscribe every sheet, which was never yet contended. And that, as to the legal possibility of seeing the *edge* of every sheet, nothing hinders a man from writing his will on paper of various sizes; and if a little bit be inserted in the middle of his will between several other sheets, no witness can prove its publication, otherwise than by inference and connexion. And that the connexion of grammar and context is altogether as rational and as certain a criterion, as the connexion of a wafer or pack-thread, which Mr. *Yates* has admitted would have made it a good publication of the first sheet, though it had lain out of sight, and totally covered by the second.

[*Post*, 422, 454.]

THE KING v. DELAVAL and Others.

S. C. 3 Burr. 1434.

When the Court delivers on a *habeas corpus*, protection to the party *redoundo* is of course. If they change the custody of the person, it is always done in Court.

ANN CATLEY (the daughter of a gentleman's coachman), was apprenticed by her father, at sixteen years old, to one Bates, a music-master, for seven years; and the father was bound in a penalty of 200*l.*, in case of the girl's misbehaviour or running away, when qualified to be profitable to her master. About the age of nineteen, she became acquainted with Sir Francis Blake Delaval, and had a criminal correspondence with him, which produced other irregularities in her conduct. Bates, the master, being angry at her behaviour, threatened to turn her out of doors, and sue the father for the penalty. Hereupon Sir Francis took a lodging for her and her mother, and furnished it, the master allowing her 25*l.* a year for her board,

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and being to have her earnings as a singer at Covent Garden Theatre and Marybone Gardens.

Afterwards, at the girl's request, Sir Francis paid Bates the 200*l.* penalty, and agreed to pay him 200*l.* more, for her earnings this season, and had a general release from him to the girl and Catley the father. She then agreed to bind herself apprentice to Sir Francis for the residue of the term in the common form, and with the usual covenants of such *indentures, and also a special covenant not to leave Sir Francis's house; and Sir Francis covenanted to instruct, or cause her to be instructed, in the art of music. The father was made a party to this indenture; but when Fraine the attorney brought it him to execute, he kept it;—and now, 13 May, moved the Court for an information against Sir Francis, Bates the master, and Fraine the attorney for a conspiracy to debauch his daughter under the forms of law; and for a *habeas corpus* directed to Delaval to bring in the body of Ann Catley; which he did the next day, without any return *in scriptis* (*f*) (which the Court allowed to be well enough), and the girl was discharged out of his custody. Upon this the father attempted to seize her in Court, but was not permitted, and reprimanded for the contempt by the Chief Justice. She declared her attachment to Sir Francis, and aversion to go home with her father; upon which, *Norton*, Solicitor-General, desired the direction of the Court, that she might be protected from any violence *redendo*. But, as her intention was plain to return to cohabit with Sir Francis, the Court hesitated as to that point; and said, that such protections depend on the circumstances of the case. Sometimes we go so far as to send an officer with the parties home. At other times we only protect in the face of the Court. It may, or may not, be proper for a father to have the custody of his child under age, [till] arrived at years of discretion. In the present case, he seems to have assigned over his parental authority to Bates the master, by the indenture of apprenticeship. However, let cause be shewn on the information, the 16th, (being the last day of Term) and let the girl and her master then attend; and in the mean time let no person molest her on pain of being committed.

On the 16th cause was shewn; and the conduct of the young woman appeared so thoroughly vicious, that the Court declared, they had no hopes of reclaiming her; and that the only question was, whether any temporal crime had been committed deserving the interposition of this Court.—They were led to believe, that the girl had been ruined by conspiracy, and that the father and mother were originally parties to it; though now the father appeared in the light *of prosecutor. The rule was therefore enlarged to the first day of Trinity Term(*g*), that the father and mother might answer the matter of the defendant's affidavits. (" *Qu.* If they should appear to be guilty, who will be now the prosecutor?")

(*f*) See *Mack's Ca.*, post, 805; *Worman's Ca.*, 1204.

(*g*) See post, 439, *S. C.*

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But as to the delivery in pursuance of the *habeas corpus*, Norton, Solicitor-general, observed, that the Court have been ever very reluctant to do any thing but release from the confinement; and cited the *King and Clarkson*, Trin., 7 Geo. 1, Str. 444; *King and Johnson*, H. 10 Geo. 1, Id. 579, Lord Raym. 1334; *King and Smith*, Trin., 10 Geo. 2, Stra. 982.

LORD MANSFIELD, C. J.—We have considered those cases very fully. We think, what was done in all of them was very right; but we don't agree with what was said in the books about them. In the case of wards, not *sui juris*, the Court is bound to protect them. And, wherever the Court does not think fit to deliver the parties into ny special custody, they will privilege them *redeundo*. If the Court refuses that, it impliedly directs the parties to break the peace, even in Palace-Yard. As to the cases; 1, *K. and Clarkson*. A young lady, of marriageable years, lives with her legal guardian. A man claims to be her husband, and sues out a *habeas corpus*. She, in Court, denies the marriage. Till the fact is tried, the Court cannot change the custody. They therefore protected her home by a tipstaff, lest the pretended husband should seize her *redeundo*. But this bears no resemblance to Lady Harriot Berkley's Case, as the reporter has made the Court declare. 2, *K. and Johnson*. Frances Holland, a child of nine years old, brought up in custody of a guardian, appointed by the Spiritual Court. This Court delivered over the custody of the child to her guardian, appointed by her father's will;—the Court did right. What authority had the Spiritual Court to appoint a guardian in such a case? If a child be in custody improper for it, the Court will not remand; for if it remands, it must also protect. And if a child be kidnap^d, or kept up for the purpose of prostitution, shall this Court send them back again, and not rather restore them to their parents or guardians? It is said in the next case, that Lord Raymond repented of what was done in this. His Lordship was latterly a very scrupulous man. But we are clear, his first judgment was the right one. 3, *K. and Smith*. A boy almost fourteen living with his aunt, brought up by *habeas corpus* at the suit of his father. The Court only delivered him out of custody, and informed him, he might go where he pleased. He chose to remain with his aunt. According to the note I have seen of it, the Court had a very ill opinion of the father's designs; and the boy expressed great unwillingness to go to him.—Upon the whole, the true rule to be collected from all these cases is, that, if the circumstances require a change of the custody, it must be delivered in Court: If they do not require it, the privilege *redeundo* is of course (*h*).

In the present case, upon the circumstances, we think it very improper for her to go to her father. He used her ill before she was apprenticed; and by the indenture has parted with all his parental authority. She must be discharged; and of course,

(*h*) *R. v. Mead*, 1 Burr. 542; *R. v. Clarke*, Id. 606. In *R. v. Brook*, 4 Burr. 1991, the Court gave the person a tipstaff to secure her from insult on her return. See also *R. v. Winton*, 5 T. R. 89.

will have her privilege *redeundo*: but I will not interpose in any extraordinary manner.

DENNISON, J., WILMOT, J., *accord*.

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STEPHEN [*et al.*] v. COSTER *et al.*

S. C. 3 Burr. 1408.

ACTION on the case against certain malt-factors, for loading and unloading malt at the plaintiff's wharf, without paying any duties for the same. On trial at Guildhall the following special case was made:

By an order of Privy Council, 1st of May, 1674,—reciting the statute, 22 Car. 2, c. 11, s. 44, which enacts, "That a public wharf or key be left along the river-side, from the Temple to London-Bridge, forty feet wide; and that no vessels shall *lie before the same longer than shall be necessary for the lading or unlading of goods, without consent of the several wharfingers; and that it shall be lawful for all persons to load or unload goods at the same, paying for wharfage and cramage such rates, as the King in council, from time to time, shall appoint."—King Charles 2d did appoint certain rates to be taken for all goods brought unto, shipped off, loaden or unloaden, at Brooke's wharf; and that the rate for malt was 6d. *per* score.—That the plaintiffs were wharfingers, and possessed of Brooke's wharf, and entitled to the said rates;—that the defendants were consignees of a loading of malt, which was brought in a west-country barge to Brooke's wharf; which barge was fastened and lay at Brooke's wharf, and unloaded a small part of her cargo upon the said wharf; and, while she lay there fastened, the other part of the cargo was taken out and put on board lighters, and never landed on the wharf. The question is, whether the defendants are liable to pay the wharfinger according to the rates mentioned in the order of council for such part of the cargo as was put on board the lighters, and never landed on the wharf.

Wharfingers in London are [not] entitled to wharfage for goods unladen into lighters, from barges fastened at their wharfs.

[*Post*, 423.]
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Wallace, for plaintiffs.—At common law none could lade or unlade at a wharf, but by contract with the owner. This act of Parliament obliges the owner to allow the use at certain rates; therefore just and reasonable, that he should have the rate appointed. Defendant fastened in the usual way for unlading, which the plaintiff could not prevent; and so had the use and benefit of the wharf. In the case of a fair, stallage is due, whether a man sells any thing or no; *Case of Newington Fair*, 2 Roll. Abr. 123(i). The statute has not fixed how much he shall unlade at the wharf;—therefore, by unloading a bushel a day, he may justify lying there, may keep other barges off, and unlade the rest of his cargo in lighters.

Burland, Serjeant, for defendants.—The statute vests a power in the King and Council to make rates. If the power

(i) *Market* (B) pl. 1; S. P. *Hickman's* 835; Com. Dig. *Market* (F 2). See Mayor *Ca.*, *ibid.* pl. 2; *Full v. Hawkar*, Meese, of *Norwich v. Swan*, *post*, 1116.

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is exceeded, the order of council is void. * The words "*brought unto the wharf*," are in the order only, and not in the act of Parliament. A wharfinger could not, at common law, hinder barges from being unladen into lighters. No necessity therefore for a statute to enable the barges so to do. The compensation arises from the new right given by the statute, not for that which the barge-master had at common law. By s. 21, there is a penalty laid on the wharfinger, refusing to let goods be landed and shipped at or off his wharf. This shews the intent of the act: "*Landed at*" and "*shipped off*," refer to that only which is on, or comes to, land. Duty is given for *wharfage* and *cranage* jointly: For the use of the land, and for the instrument. This applicable only to what is unloaded on the key. We have used neither wharf nor crane. The measure of the duty is the quantity shipped off or on: A most uncertain criterion upon the pretence now set up! How will the wharfinger know how much is put into the lighters? As for the benefit of fastening, it arises from a tortious use of, and intrusion on, the wharfinger's property; for which he has remedy by action. If the act had given the barge a right to moor longer than was necessary for unloading, then it had been reasonable to have given a toll in recompence: But sect. 45 has prohibited it. By the doctrine now contended for, the merchant would be subject to the inconvenience of a double duty; one, for unloading into lighters; the other, for landing at any other part of the river. Sect. 45 is a sufficient restraint upon the merchant. They can lie no longer than is necessary. If they anchor, and ship off their goods in the middle of the river, no duty can then be payable. Why then is it due for doing the same thing nearer land? * The case of stallage is, because whoever sets up a stall takes the benefit of the fair, as far as lays in his power. We take no benefit of the wharf.

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LORD MANSFIELD, C. J.—This being a case of great consequence to the wharfingers and barge-masters in general, let it stand for further argument.

[*S. C. Post*, 423.]

THE KING v. NUEYS and GALEY.

Judgment for perjury (in subscribing witnesses) to set aside a will.

THESE were the three subscribing witnesses to Mr. Jolliffe's will, (see p. 366), who were afterwards convicted of perjury, on three several indictments, for swearing at the trial at bar, that the testator was utterly incapable of making one: And they now received judgment, to be, each of them, imprisoned six months, to stand twice in the pillory, with a paper on their heads denoting their crime, once at Westminster Hall Gate, and once at Charing Cross; and to be transported to America for seven years.

N. B.—The elder Nuey was about 70 years of age, the younger about 35; and Galey about 60. They afterwards obtained a pardon in respect to their transportation.

SITTINGS AFTER TERM.—LONDON.

NEWBY v. REED.

IT was ruled by Lord *Mansfield*, C. J., and agreed to be the course of practice,—That upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers (*k*).

In case of a double insurance the insured may recover the whole against any of the insurers, and leave him to recover satisfaction from the rest.

(*k*) Where the plaintiff had insured at *Liverpool* on a voyage from Newfoundland to Barbadoes and the Leeward Islands, with an exception of American captures, and afterwards insured at *London* on the same ship from Newfoundland to Dominica, and from thence to the port of discharge in the West Indies, without that exception; he had a verdict against a *London* underwriter for his full demand, with liberty to the defendant to bring an action against the *Liverpool* underwriters if he thought fit; *Rogers v. Davis*, Park's Ins. 423 (ed. 1817). Accordingly this defendant brought an action for money had and received, in order to recover a contribution for the loss, which he had been obliged to

pay, and got a verdict. Lord *Mansfield*—“The question seems to be whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a re-assurance. But a re-assurance is a contract made by the insurer to secure himself; and this is only a double insurance;” *Davis v. Gildart*, Id. 424. See *Godin v. London Assurance Company*, ante, 103.

CAMDEN v. COWLEY.

ACTION on a policy of insurance, on a ship at and from Jamaica to London. The ship was also insured from London to Jamaica generally; and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward bound cargo at the other ports of the island.

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Evidence of the general opinion of merchants allowed to be given to prove the custom of merchants.

In order to shew when the homeward bound risk commenced, it was necessary to shew at what time the outward bound risk determined; and to prove, that, by the custom of merchants, the outward bound risk determined, not when the ship arrived and moored twenty-four hours in any port of the island, (as the plaintiff in the present cause contended), but when she had been safe twenty-four hours in her last port of delivery.

Insurance on a ship to Jamaica is determined, by the ship's mooring twenty-four hours in any port there, and does not continue till she comes to the last port of delivery.

Lord MANSFIELD, C. J., ruled, that insurance-brokers and others might be examined, as to the general opinion and understanding of the persons concerned in the trade; though they knew no particular instance, in fact, upon which such opinion was founded (*l*).

The jury, being special, found a verdict for the plaintiff.

(*l*) As to evidence of usage, see *Noble Dewar*, 1 Camp. 503; *Ougler v. Jennings*, Id. 505, n. “On mercantile contracts *v. Kennaway*, 3 Doug. 510; *Vallance v.*

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TRIN. TERM.
3 Geo. 3, 1763.
After a full trial
by a competent
jury, if no fresh
light can be
thrown in, a
new trial shall
not be granted
(c).

MOTION for a new trial; the verdict being (as was suggested) contrary to the sense and meaning of the parties. But Lord Mansfield, C. J., stated to the Court, that the ship in question was what is called a *general* ship; *vis.* advertised at Lloyd's coffee-house, as bound to the island generally, and by the course of trade to touch at the several ports of the island, there to deliver some goods, and take in others; that it was insured *at and from* Jamaica, and warranted to depart with convoy. The policy was very inaccurately worded, in not defining what was meant by being *at* Jamaica; and I left it to the jury, which was a very capable one.

The inclination of my opinion was the contrary way; but I think it was thoroughly tried, and that no new light can be now thrown in. And, therefore, I am against granting a new trial; which, if the verdict should be contradictory, must in the end produce a third.

DENNISON, J., *accord.*

WILMOT, J., *accord.*—I think the verdict a right one. The ship arrived *at* Jamaica, the first port she came to trade in (b).

Rule denied.

relating to insurances, &c. Courts of law examine and hear witnesses of what is the usage and understanding of merchants conversant therein: for they have a stile peculiar to themselves, which is short; yet is understood by them; and must be the rule of construction:” Per Ld. Hardwicke, C. in *Baker v. Paine*, 1 Ves. 8. 458. See also *Blunt v. Comyns*, 2 Ves. 8. 331; *Chamrond v. Angerstein*, Peake, N. P. C. 48; *Birch v. Depeyster*, 4 Camp. 388; and ante, 299, 300.

(a) See *Faccraft v. Devonshire*, ante, 195, per Lord Mansfield; and *Collinson v. Larkins*, 3 Taunt. 1.

(b) *S. P. Barras v. London Ass. Comp.*, Park’s Ins. 64; Marsh. Ins. 266. *Leigh v. Mather*, Ib. 1 Esp. 412, S. C. Where a

ship was insured *at and from* Jamaica, warranted to sail after January 12th, and was lost before that day in sailing from one port of the island to another, the insured recovered, on the ground that she was protected in moving from port to port in the same island; *Cruickshank v. Jansen*, 2 Taunt. 301; and see *Constable v. Noble*, Id. 403; *Vallance v. Dewar*, 1 Camp. 503. As to the construction of policies, see Ld. Mansfield’s judgment in *Pelly v. Royal Exchange Assurance Company*, 1 Burr. 347; *Brough v. Whitmore*, 4 T. R. 206; Ld. Ellenborough’s judgment in *Robertson v. French*, 4 East, 135. See also *Hodgson v. Richardson*, post, 463, and *Carter v. Bosham*, post, 593.

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The KING v. SHOWLER and Others.

S. C. 3 Burr. 1391.

Overseers of the poor cannot be appointed in a place which has never yet been considered as a separate vill in respect of the poor, unless there be a competent number of substantial householders.

IT was objected by Norton, Solicitor-General, to an order of Sessions, confirming the appointment of overseers of the poor in Haugh, alias Hoff, in Lincolnshire; 1st, That though Haugh is called a vill in the order, yet the facts stated specially shew it not to be so (c). It consists of a capital mansion, two ancient cottages, and one modern one, all rented by one and the same

(c) Standard Hill having been always deemed extra-parochial, and no part of it ever having been reputed to be a township or vill, or assessed to the relief of the poor, and never having had a constable or overseers; the Court of K. B. quashed an appointment of overseers, though at the time it consisted of more than 17 dwelling

houses occupied by substantial housekeepers, and contained upwards of 140 inhabitants, and 36 menial servants were resident therein. Per Ld. Ellenborough, C. J.—“The immediate consequence of our holding this to be a vill, for which overseers ought to be appointed, would be, that overseers must be appointed for all the Inns

farmer, who occupies the great house himself, and has put *four* labourers and their families into the *three* cottages. 2dly, That one of the overseers appointed is a day labourer (*d*); and therefore, not a substantial householder within the statute (*e*).

Harvey shewed for cause, 1st, That Haugh has four houses and five families: Co. Litt. 115, defines a vill to consist of *plures vicini*. Though now converted into only one farm, yet that shall not destroy its existence as a vill, and evade the provision for the poor. In *Denham* and *Dalham*, Stra. 1004, held that Southwold was no vill, because it had not more than two houses. In *Stoke Prior* and *Grafton*, Ibid, 1071, Grafton had not the reputation of a vill, being only a nobleman's house, turned into farms. Here, besides the mansion and new cottage, are two ancient cottages.

Kempe, on the same side, cited Spelman's Villare, and Camden's Britannia, to shew that Haugh had the reputation of a vill.

But the Court, without hearing counsel in reply, or entering into the second point, quashed the order; because the intent of the act was to have a separate provision for the poor made only where there was a competent number of substantial householders. And, as no evidence appears that ever there was an appointment of this kind before, it may probably be an attempt by the farmer, who has no poor of his own to provide for, to exempt himself from contributing to any *poor's rate, [*420] by making Haugh farm a separate vill, which it never yet has been, for the purpose of maintaining the poor. And WILMOT, J. cited the *King* and *Welbeck*, Trin 13 & 14 Geo. 2 (*f*).

of Court and every collegiate or ecclesiastical establishment, which would work a great alteration in the laws relating to this subject;" *R. v. Standard Hill*, 4 M. & S. 378.—See also *R. v. Tamworth*, Cald. 28; *R. v. Peterborough*, Id. 238; *R. v. Justices of Bedfordshire*, Id. 167.

(*d*) It appears that this would not have been a material objection; *R. v. Stubbs*, 2 T. R. 395; in which case it was also held, that a woman may be appointed overseer: for a woman may be queen-regnant, marshal, great chamberlain, and champion of England, high sheriff, commissioner of sewers, returning officer for members of Parliament, governor of a workhouse, gaoler, sexton, and common constable: for all these, being only ministerial offices, may be executed by her deputy, agent, or minister. But a woman cannot fill any judicial situation, which depends solely upon the judgment of the person exercising the office, and which, therefore, must be exercised in person. But practising barristers, and attorneys (*comme sensu*.) *Poordage's Ca.*, 1 Mod. 22; *Prouse's Ca.*, Cro. Car. 369; Clergymen, *Anon.* 6 Mod. 140; dissenting ministers, 1 W. & M. c. 18, s. 11; Roman Catholic priests, 31 G. 3, c. 32, s. 8; high constables in a different hundred, *Anon.*, T. Jones, 46; officers of the cus-

toms, *Bishop v. Lloyd*, Bunb. 255; *R. v. Warner*, 8 T. R. 375; revenue officers, *Raymond v. St. Botolph's*, 2 Cl. R. 196; *Cawthorne v. Campbell*, 1 Anstr. 205; apothecaries, 6 & 7 W. 3, c. 4; freemen of the company of surgeons, 18 G. 2, c. 15, s. 10 (under certain restrictions), and non-commissioned officers and privates in the militia are exempt. It also seems that justices of the peace are exempt; *per* Ld. Kenyon, in *R. v. Paleman*, 2 T. R. 777.

By 59 G. 3, c. 12, s. 6, justices in sessions may appoint non-residents overseers with their own consent; and by s. 7, the inhabitants in vestry may elect, and justices may appoint, an assistant overseer with a salary. Where A., B. & C., being partners, had a dwelling-house in parish D., which they visited daily for purposes of business, and paid the rent, rates and taxes, which their clerk inhabited, but they did not reside there themselves; it was held, that each of them was liable to serve the office of overseer; *R. v. Poynder*, 1 B. & C. 178, 2 D. & R. 258.

(*e*) As to the meaning of this word, see *R. v. Hall*, 1 B. & C. 178, 2 D. & R. 241, *S. Ca.*, where all the authorities are referred to.

(*f*) 1 Bott, 24 (ed. 1793).

IN THE EXCHEQUER.

TORRIANO *v.* LEGGE and Others.*S. C.* 3 Wood, 61; *Gwill.* 909; 2 *Eagle*, 200.

Nine modus's over-ruled by the Court without directing any issue to try their existence.

BILL for tithes in kind, of the parish of Chinkford in Essex: the defendants set up nine several modus's, *vis.*

1. A modus of *5s. per* acre for all land sown with wheat, in lieu of all tithes of wheat.

2. A modus of *2s. 6d. per* acre for all land sown with other grain, in lieu of all tithes of other grain.

3. A modus of *2s. per* acre for all meadows mowed, and *1s. 4d.* for up-land grass grounds mowed, in lieu of all tithes of grass, hay, and pasture within the parish.

4. A modus of *2s. 6d.* for every farrow of pigs littered within the parish, in lieu of all tithe of pigs.

N. B. These four were given up by the defendant's counsel, and overruled by the Court, as being too rank, by approaching too near the real value of the tithes.

5. A modus, that the parson shall have all the hay of two acres in a piece of land of twenty acres, called the Nayses, in lieu of tithe hay in that piece of land.

N. B. This was overruled by the Court; because, 1. The answer set forth two acres in a ground of twenty acres, and the proof was, of four acres in a ground of forty. 2. It was uncertain, as the two acres were not specifically set forth, but left indeterminate, as to their situation in the field.

[*421] *6. A modus of *8s. per* score of lambs, in lieu of the tithe of lambs.

N. B. This was also overruled, as being too rank, by valuing a lamb at *4s.*

7. A modus of *9d.* for every cow depastured on the meadows, and *6d.* for every cow depastured on the up-lands, in lieu of the tithe of all cows, calves, and milk.

N. B. This was likewise overruled; 1. Because, if, under this prescription, agistment tithes are not included, then it seems to be rather rank. But principally, 2. Because, whether agisted cattle are or are not included, the recompence is too loose and uncertain; for a parson, in lieu of a certain right at common law, must have a right equally certain by the prescription. And here, if a cow be depastured, partly on the up-lands, and partly on the meadows, which payment is the parson to demand? Or how shall he be able to distinguish them?

8. A modus of *1d. per* fleece of all wool shorn in the parish, in lieu of all tithe wool.

N. B. This was also overruled; a fleece being, on an average, not worth above *1s. 6d.*, and the tithe in kind therefore not much above *1½d.*, which makes it rank. And besides, being confined to the wool shorn in the parish, it sets up a *modus de non decimando* as to wool shorn out of it.

9. A modus of 4d. upon every orchard, in lieu of tithe of all fruit-trees within the parish.

N. B. This was, lastly, overruled; because it is a modus of one tithe in lieu of another. Had it been in lieu of all orchards, or fruit growing in all orchards, it might have been good.

*The Court, upon the whole, decreed an account for all the tithes in kind, without directing any issue to try the existence of any one of them (g). [*422]

Sewel, Hussey, Blackstone, Feilde, for the plaintiff.

De Grey, Harvey, Bicknell, for the defendant.

(g) See *Pyke v. Dowling*, post, 1257, and cases there referred to.

IN THE KING'S BENCH.

BOND v. SEAWELL.

S. C. Ante, 407.

THIS case was again argued by Serjeant *Hewitt*, for the plaintiff, and *Thurlow*, for the defendant.

The Serjeant took a difference between the attestation of the act itself of making a will, to which three witnesses are clearly requisite by the statute, and the attestation that such a sheet is part of that act, to which one witness is (by common law) sufficient. And he cited *Stonehouse* and *Evelyn*, 3 P. Wms. 254. That, though by the statute, the testator must sign the will, yet the proof of his signing it may be by one witness only.—Nothing else material was added to the former arguments.

[*S. C. Post*, 454.]

GLOVER v. BLACK. (*Ante*, 399, 405.)

LORD MANSFIELD, C. J., delivered the judgment of the Court.—At the trial of this cause, and since, I have leaned as much as possible to support the insurance. My reason was, because it appeared to have been transacted in this form, not through any design, but merely by a slip of a boy, the insurance broker's clerk, in not inserting the word "*respondentia*," according to his orders. To be sure, the statute 19 Geo. 2, (which contains a clause to regulate insurances on money lent on *respondentia* in voyages to the East Indies) does consider the owner of the goods as having a right to insure only for the value of the surplus not covered by the *respondentia* bond: and, to many purposes, the *respondentia* creditor has a lien on the goods (h). But we are satisfied, that this act did not

An insurance on goods does not extend to a *respondentia* interest.

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(h) But see *Buak v. Fearon*, 4 East, 319.

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mean to alter the law of insurances, so far as regards the form of policies: it only meant to prevent wagering policies. The act itself describes the insurance made by the creditor to be on the money lent: it refers to the old manner of insurance. Now, bottomry and *respondentia* have in practice always been considered as a particular species of insurance, and have taken a peculiar denomination. All the forms express the insurance to be on bottomry or *respondentia*. Nor is there a *dictum*, that *respondentia* can be insured under the word *goods*. It would be very dangerous therefore to establish a precedent to the contrary, since the consequence may be bad, and introductive of frauds, though we cannot now foresee the particular mode of them. The ground of our determination is, that, by the custom of merchants, *respondentia* is always insured under a special denomination. But we by no means say, that under an insurance on goods at large a man may not prove his interest by a mortgage, or other special lien (i).

Plaintiff must be nonsuited.

(i) "The lien which a factor, to whom a balance is due, has upon the goods of his principal, comes under the exception taken by the Court; and an insurance upon such an interest seems to have been admitted, if not absolutely held, to be good in the case of *Godin v. London Assurance Comp.*, ante, 103;" *Park's Ins.* 14 (ed. 1817).—

Money expended by the captain for the use of the ship, and for which *respondentia* interest has been charged, may be recovered on an insurance on "goods, specie, and effects;" there being evidence of express usage to sanction such a determination: *Gregory v. Christie*, *Park's Ins.* 18; *Marsh. Ins.* 118 (ed. 1808).

STEPHEN v. COSTER.

S. C. Ante, 413.

Wharfingers in London are not entitled to wharfrage for goods unladen into lighters out of barges fastened to their wharfs.

THIS case was again argued by *Norton*, Solicitor-General, for the plaintiff.

The order of council must be considered as a recent, contemporary, exposition of the statute. The malt in question is subject to pay wharfrage, both within the letter and the spirit of the statute, and order of council. 1. Within the letter; for it was unloaded at the wharf. A barge, which lies close to and fastened to the wharf, is always said to lie at such a wharf. It is allowed, that duty is payable for so much as was brought to land; why? because, unloaded at the wharf. That which was water-borne is equally liable, for the barge continued in the same station. Either, therefore, the first was not liable at all, or both are liable; either none was unloaded at the wharf, or the whole was unloaded there. 2. It is within the spirit of the law. The wharfinger is obliged by the statute to give up his private property to the use of the public. He is, therefore, in justice entitled to his wharfrage. The defendant has the full benefit of the wharf, and ought to pay for it. The present practice is a notorious fraud; it puts the wharfinger totally in the power of the barge-master. He may justify coming there for the purpose of unloading; and yet, by not *landi*ng any goods, evade all the wharfrage. As to the incon-

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venience pretended, that by this claim the goods are subjected to double wharfage, if landed at another wharf; that depends upon the owner's choice. If he sees it most convenient for himself, he will land them here; if otherwise, elsewhere. It was said, that an action of trespass would lie for fastening to the wharf. I deny it. You might justify in an action of trespass, by saying you fastened for the purpose of unloading; and this would be a sufficient bar.

Blackstone, for the defendant.—So far as the order of council is warranted by the statute, it is binding: if in any respect it exceeds it, it is unwarranted, and of no validity. Their discretion extends only to the *quantum* of the rate to be imposed, not to determine the act, by which such rate may become payable. The statute makes it lawful for all men to load or unload at the plaintiff's wharf, paying him a recompense for the same; which at common law they could not do. At the same time, to prevent a bad use of this general licence, it makes it unlawful to lie in the river before the wharf longer than is necessary for such loading or unloading; which at common law they might have done. * In the present case, the plaintiff is not entitled to the recompense claimed; because the fact stated is not an unloading *at* the wharf. 1. Not within the letter: for, *at* must be equivalent to, *upon the wharf*. The thing permitted by the statute is something not lawful to do by common law, *viz.* landing goods upon another's soil: not unloading them *near to*, or *on the side of* his soil; which was clearly lawful at common law, and therefore not the thing made lawful by the statute, and ordered to be paid for. 2. Not within the reason of the statute. In reason, the wharfinger is entitled to a recompense in proportion only to the use made of his soil, by the quantity of goods actually put on land. It is objected, that this practice is fraudulent, and inconvenient to the wharfinger. The fact is disputable; but, granting it both unfair and prejudicial, this remedy is unjust and inadequate. Because the defendant stays longer than is necessary for the goods he does land, therefore he shall pay wharfage for the goods he does not land. The injury, if any, must be measured by the space the barge occupies, and the time for which it continues. The remedy now claimed depends on the quantity of the goods sent off in lighters, and the rate at which they are prized in the order of council. One is not commensurate to the other. If this is equivalent to loading or unloading at (*i. e.* upon) the wharf; there will be two duties to be paid even here, besides what may be paid at other wharfs, where they actually land: the rate inwards, for unlading goods out of the barge; and the rate outwards, for lading them into the lighter. Which of these rates is the plaintiff entitled to? He is as much entitled to both, as either. The true remedy is by an action on the case for the special injury, if any be really suffered. Perhaps too an action of trespass might be maintained for unnecessarily fastening to the wharf; in which case the permission given by the statute ceases: and though the barge-

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master has originally a right to fasten there; yet, if he makes a tortious use of that permission, which the law allows him, he will become a trespasser *ab initio*.

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Afterwards, in the same Term, Lord MANSFIELD, C. J., delivered the opinion of the Court.—*Some cases are in themselves so plain, that reasoning upon them only serves to make them doubtful. Of this nature is the present. To go by steps: the wharfingers do not contend, that there is any meaning in the words, *brought unto*, in the order of council, they not being found in the act of Parliament: nor that any duty is payable for such part of the cargo as is not unladed at all: nor that any duty is payable for putting goods on board lighters in the river, when the barge is detached from the wharf. The particular circumstance on which the plaintiff founds his claim is, that the barge was fastened to the wharf. If any duty is due at all, it must be by the act of Parliament. The act gives a duty for the wharfage and cranage, the nature of which duty is, for laying goods upon the wharf. It differs specifically from a duty for anchorage or mooring. In common speech, loading or unloading at a wharf signifies from, or upon, the wharf. We are extremely clear, that this case is not within the act. The advantage of mooring is different from that of unlading. And for the unlading, another duty is payable if the goods are sent off to other wharfs. It is said, here is an injury to the wharfinger, in making use of his piles for mooring. But the remedy is left the same as before the act; besides that the practice, if unnecessary, is particularly forbidden by the statute. An action on the case, or perhaps other remedies, will lie for the wharfinger: or he may cut off the cordage by which they fasten. But supposing it an inconvenience, and a *casus omissus*, a Court of law cannot aid it by construction, where the statute, which gives the duty, has not thought proper to express it. Neither, as was observed at the bar, is it in the discretion of the Council to aid it. Their power relates only to the rates themselves, not to the thing rateable.

The plaintiff must be nonsuited (*k*).

(*k*) This case was recognized in *Sydes v. Hay*, 4 T. R. 260; from which case it also appears, that, in the port of London, a captain of a vessel is liable to a demand

for anchorage and moorage, when wharfage is not paid for landing goods. See, also, *Bolt v. Stennett*, 8 T. R. 606; and *post*, 581.

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BROWN v. CHAPMAN.

S. C. 3 Burr. 1418.

Action on the case lies for suing out a malicious commission of bankruptcy, notwithstanding the spe-

ERROR from the Common Pleas. This was an action on the case, for maliciously suing out a commission of bankruptcy. On not guilty pleaded, verdict for the plaintiff. Defendant moved in arrest of judgment, that the action did not lie; but the Court of Common Pleas over-ruled the objection, and gave judgment. And now *Hewitt*, Serjeant, argued, that this action

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law.

did not lie, because there is a specific remedy pointed out by the statutes relative to bankrupts. That by statute 5 Ann. c. 22, sect. 7, a bond for 200*l.* shall be given by the petitioning creditor (*l.*), which shall be assigned to the party injured, if the commission is maliciously sued out. And the statutes 5 Geo. 1, c. 24, and 5 Geo. 2, c. 30, [s. 23], enact, that the Court of Chancery may examine into the same, and order satisfaction; and, if necessary, may direct the bond to be assigned. That the penalty being inserted in a subsequent act is the same as if it had been in the first statute concerning bankrupts, in 34 Hen. 8. All are one system; and the last act shall enure, as if all the old ones were thereby repealed and re-enacted. And for this he cited Cro. Jac. 643; Plowd. 206; 11 Rep. 59; Carter, 36; 1 Ventr. 246.

LORD MANSFIELD, C. J.—This case is too clear to hear any argument on the other side. There is no clause to take away the jurisdiction of the common law;—no clause that a man shall not receive more damage than 200*l.* What became of the subject from the 34th of Hen. 8 to the 5th of Q. Anne, if he had no other remedy than arose from this specific provision?

Judgment affirmed (*m.*).

(*l.*) See the provisions of the last Bankrupt Act, 6 G. 4, c. 16, s. 13.

(*m.*) *Chapman v. Pickersgill*, 2 Wils. 145; and *Ex parte Lane*, 11 Ves. J. 415, *acc.* Lord Hardwicke, C., said, "It was in the breast of the Court (of Chancery), where the bankruptcy was a doubtful case, and the commission superseded, either to direct an enquiry before a Master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law, and after the damages were settled, the Court might, for the better recovery thereof, order the bond to be assigned, but in that case the bond was assigned without any enquiry to assess the damages *whereby the assignee would recover the whole penalty*; *Ex parte Gayter*, 1 Atk. 144. And the Lord Chancellor may either order a specific sum by way of damages to be paid by the obligor, or assign the bond, and enable the assignee to recover the whole penalty; and such assignment is conclusive evidence of fraud and malice; *Smith v. Broomhead*, 7 T. R. 300. The Lord Chancellor may, *proprio vigore*, ascertain the amount of the damages sustained by

the party grieved, without any suit instituted for that purpose, or the intervention of a jury. And for the recovery thereof, he is authorised to assign the bond of the petitioning creditor, whereby a remedy at law is given, which will bind his property. If he find that the party grieved has been damnified, it is competent to him to assign the bond, and he may, upon further examination, ascertain whether the damage sustained amount to the whole or what part of the penalty; and the only purpose of such assignment is, to give the party grieved a legal lien for his damages on the obligor's estate. And it seems such a bond is not within 8 & 9 W. 3, c. 11, s. 8, for a jury to assess damages; for the power of assessing damages is specifically given to the Lord Chancellor, although he may assist his conscience by directing an enquiry before the Master, or an issue at law; *Smithey v. Edmonson*, 3 East, 22.—See *Ex parte Rimens*, 14 Ves. J. 600, and *Bonham's Ca.*, 8 Rep. 121 a. See also 1 Wms. Saund. 135 a, n. (4), and Lord Mansfield's judgment in *R. v. Robinson*, 2 Burr. 803.

WOOLMER v. MUILMAN.

S. C. 3 Burr. 1419.

ACTION on a policy of insurance, dated 23 September, 1762, at and from North Bergen to London, at two guineas *per cent.* The ship, &c. were warranted to be *neutral ship and property*; but, in truth, the plaintiffs were British * subjects, having interest on board to the amount of the sum insured. The ship foundered at sea: and the defendant now refuses to pay the

False warranty in a policy of insurance will vitiate it, though
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the loss happens

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in a mode not
affected by that
falsity.

insurance, on account of the untrue fact warranted by the plaintiff (x).

Wallace, for the plaintiff, insisted, that this warranty was only meant to secure the insurers against the peril of enemies, and therefore was equivalent to a warranty *free from capture*; and that the loss had not happened in such manner as to make the truth or falsehood of this warranty at all material.

But by Lord MANSFIELD, C. J.—The point is too clear to be argued. There was a falsehood, in respect to the condition of the thing insured; therefore, it was no contract (n).

Judgment for defendant.

(x) Mr. Douglas (now Lord Glenbervie) in a note to *Eden v. Parkison*, 2 Doug. 733, n. [1], observes, that “it does not appear very distinctly from the state of that case in 3 Burr. that the ship and goods were not neutral at the time of the contract, or of the sailing. It is only said, ‘The ship at and before the time she was lost, was not neutral property, as warranted by the policy, (3 Burr. 1420).’ It may be collected, however, upon taking Sir James Burrow’s account of the case and Mr. Justice Blackstone’s together, that they

were not neutral at the time of the contract. The point there made, as appears from Blackstone, was that the warranty was tantamount to a warranty *free from capture*, and that the loss having happened by foundering at sea, was not within the meaning of the warranty. But the Court held, that, as the warranty was false, it was no contract.”

(n) *Fernandes v. Da Costa*, Park’s Ins. 287 (ed. 1817), acc. See also *Hodgson v. Richardson*, post, 463, and *Carter v. Boehm*, post, 593.

LADE v. HOLFORD and Others.

S. C. 3 Burr. 1416; Ambl. 479.

A proviso in a will to suspend the possession of an unborn tenant in tail, till he shall arrive at the age of 26, is void.

SIR John Lade, 17 August, 1739, devised certain lands, &c. to trustees and their heirs; to the use of his cousin John Inskip for life *sans waste*, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of John Inskip in tail-male successively; remainder to the use of the trustees and their heirs during the life of Ann Nutt (now the wife of the defendant Holford), in trust, to apply the rents and profits for the benefit of such of her sons, or such other person, as for the time being should be in *esse*, and would be the next tenant for life or in tail by virtue of the limitations in his said will, in case the said Ann Nutt were dead: And from and after her decease, then to the use of her first and other sons successively in tail-male. “Provided that, during the time that “the said John Inskip shall be under the age of twenty-six, and “so often and during such time, as the person, who for the “time being (in case he had not otherwise directed), would, by “virtue of the said will, have been entitled in possession to the “devised premisses as tenant for life or in tail, shall be under “the *age of twenty-six, the trustees and their heirs shall and “may enter on the premisses, and take the rents and profits, “and apply them to the following uses, *viz.* To allow such “person, till the age of fourteen, 50*l.* *per annum*; till eighteen, “100*l.*; till twenty-one, 300*l.*; and till twenty-six, 1000*l.*; and “the residue to be disposed of as the residue of the testator’s “personal estate is thereby directed to be disposed of; *viz.* to “be laid out in lands, and settled as the estate before devised.” John Inskip took upon him the surname of Lade, as directed

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in another part of the will, and was afterwards made a baronet. In Michaelmas Term, 1740, he, by *prochein amy*, exhibited his bill in Chancery to establish this will, and carry the trusts into execution. In 1751 he attained the age of twenty-one, and in 1756 of twenty-six, then married, and died in May, 1759, leaving his wife enseat of a son (now Sir John Lade, born 1 August, 1759), who also exhibited his bill in Chancery to revive the former, and to be let into possession of the estate, when he should arrive at the age of twenty-one; and in the mean time, that he might be entitled to the full rents and profits during his infancy; might have proper allowances thereout for his maintenance and education, and have the residue laid out for his benefit.

On a hearing before Lord Keeper *Henley*, 14th November, 1760, this case was stated for the opinion of the Court of King's Bench, and thereon this question put: "Whether Rose Fuller, the heir of the surviving trustee, did, upon the birth of the present plaintiff, take any, and what estate in the devised premises, by virtue of the said proviso?"

The case was formerly argued at the bar, and was now again spoke to by *Morton*, for the plaintiff, who insisted, that no estate vested in the trustees; the proviso being void, whether it meant to vest a determinable fee in the trustees, or a mere chattel interest: because, in the first case, it tends to a perpetuity by taking away the power of alienation five years longer than the policy of the law admits; in the latter case, it has the same inconvenience, and is in derogation of the legal powers of tenant in tail.

* *Wedderburn*, for the defendants, argued, that it was an estate for years, raised by implication of law to carry into execution a power which the testator meant to vest in the said trustees. [*430.]

Adjournatur. But a few days after, the Court certified, that Rose Fuller did not take any estate in the premises under that proviso (o).

(o) Lord *Northington*, C., confirmed the certificate, and declared he was of opinion, that "the directions and provisions in the testator's will, by which he attempted to direct the accumulation of the rents and profits of his real estate, being repugnant to the limitation of an estate tail to Sir J. Lade, the infant, were void, and ought not to be carried into effect;" Butl. *Fearn's C. R.* 530, n. (ed. 1824). Mr. Butler there observes, that the ground on which the proviso was decreed to be void, seems to have been its repugnancy to the general rule, that "Estates shall not cease as to part, and vest and re-vest." This opinion he controverts, and observes, that "the

real objection to the limitation in the proviso was, that it directed a dry accumulation of the surplus rents, for a period of twenty-six years: this exceeded the period for which the law allows such an accumulation to be continued; and, in this sense, the proviso was repugnant to law, and void."—*Ibid.* As to the period during which rents and profits may be directed to accumulate, see *Thellusson v. Woodford*, 11 Ves. J. 112, 146; 39 & 40 G. 3, c. 98; and particularly Lord *Southampton v. Marquis of Hertford*, 2 Ves. & Beam. 54; *Leake v. Robinson*, 2 Mer. 363, 388; Butl. F. C. B. 536 n. (z); 616.

THE KING v. DR. HARRIS.

S. C. 3 Burr. 1420.

TWO *mandamus's* had issued to Doctor Harris, Commissary of Surry, to swear in two sets of churchwardens, who respect- *Lis pendens* is not a good re-

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turn to a *mandamus* to swear in churchwardens, though accompanied with very special circumstances.

tively suggested themselves to have been duly elected, according to the custom of the parish of St. Olave, Southwark, at Easter, 1763. The Doctor returns, that, before the issuing of the said writs, two suits had been severally instituted before him by each set of churchwardens against the other, which, for more speedy justice, were now consolidated into one: that no farther proceedings had been yet set on foot, so that he could not yet determine which set was duly elected; and, for that reason, he had not obeyed either writ.

Yates, for the prosecutors, insisted, that the Ecclesiastical Judge was only ministerial in this case: that he could not try the right, it being suggested to be grounded on a custom; and that the suggestion of the writs was not answered, the fact of due election being neither affirmed nor denied. And he cited the *King* and *Sympson*, M. 11 Geo. 1, Stra. 609, that the Ecclesiastical Judge is only ministerial: the *King* and *Ward*, H. 4 Geo. 2 (p), that, "an appeal pending, and an inhibition from the Delegates to do nothing to prejudice the right," is no good return to a *mandamus* to admit a register: and the *King* and *Reynell*, Tr. 9 Geo. 2, *mandamus* to the official of Bristol to admit Arthur Lodge churchwarden of the parish of Temple in Bristol. He returns, that in a suit before him between divers parishioners of the said parish on the one side and the other, he had decreed, that Lodge was not duly elected, and had admitted one Whitchurch [*431] his antagonist. That the cause was appealed to the Archbishop, and still pending, and therefore he had not admitted him. On mature consideration, the Court adjudged the return to be insufficient in law, ordered it to be quashed, and directed a peremptory *mandamus*.

Blackstone, for the defendant, argued, that though the Ecclesiastical Judge could not try the existence of a custom, yet if the custom were admitted on both sides (as nothing yet appears to the contrary) he might try the fact of election. That, as *non fuit electus* is allowed to be a good return (q), this implies a power of judging; i. e. of examining the premises before he forms the conclusion. That the Doctor was under difficulties how to act in such a complicated case, but was ready to obey the orders of the Court, when absolutely signified; but till then, thought it his duty to state this special matter. That such special returns are warranted by the opinion of Lord *Holt*, (Q. and *Guise*, H. 2 Ann. Ld. Raym. 1008, 6 Mod. 89) "If two sue a *mandamus*, where one only can be duly elected, the Judge may return the special matter, for he cannot tell which to swear." That in *Carpenter's Case*, P. 33 Car. 2, Raym. 439, a special return of a *lis pendens* was quashed, not because the Ecclesiastical Judge had no right to try any thing, but because he could not try the existence of a custom. That in the *K.* and *Sympson*, as reported by Lord Raymond, 1379, the return appears to be quashed, for not stating that Colchester is in the diocese of London; and nothing said about

(p) Stra. 893; Fitz. 123, 194.

(q) See *R. v. Harwood*, 2 Ld. Raym.

1405; *R. v. Twitty*, Salk. 433; *R. v. Mayor of York*, 5 T. R. 66.

the Archdeacon's being merely ministerial, as in *Strange*. That, in the *K. and Reynel*, Lodge was no party to the suit before the official; it was *res inter alios acta*, and could not be set up against him. But here both parties had voluntarily applied (as plaintiffs) to the Commissary's Court.

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Lord MANSFIELD, C. J., interrupted the argument with warmth; said the defendant had nothing to do but to obey the King's writ; that all the cases cited on his behalf made strongly against him; wondered, that a civilian should deliberately make such a return, which amounted to saying, that he would not obey the writ till he had determined the cause; that if he had any scruples, the Court would ease them immediately, by granting a peremptory writ. Accordingly, the returns were quashed, and two peremptory *mandamus's* ordered (*absentibus Dennison and Foster*). But the contending parties afterwards agreeing to try the fact of the election (for the custom they both agreed in) upon a feigned issue, the Court directed the peremptory *mandamus's* to stay (r), and that one only should issue, on behalf of that set of candidates for whom the verdict should be found (s).

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(r) "*N. B.* On the trial of the issue at the sittings in London, after Term, both elections were found to be void. So that, in the end, no peremptory *mandamus* is-

sued." Note to the first edition.

(s) See *R. v. Dr. Hay*, post, 640; *S. C.* 4 Burr. 2295; *Bac. Abr. Churchwardens* (A); *Com. Dig. Mandamus* (D).

THE KING v. THE JUSTICES OF SEAFORD.

MOTION for an information against four persons, who were churchwardens and overseers of Seaford, and also the only justices of peace for the said borough, for refusing to put a substantial householder upon the poor's rate (which is a necessary requisite towards giving a vote for members of Parliament), and upon appeal refusing to amend the rate, or give relief in Sessions. But, as they were acting in a court of record, with powers entrusted to them by the constitution; the Court said, it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information; and therefore refused to grant a rule to shew cause (t).

No information against justices acting in Sessions, unless in very flagrant cases.

(t) See 2 Hawk. P. C. c. 13, s. 20; *Palmer*, Id. 1162; *R. v. Jackson*, 1 T. R. *R. v. Young and Pitts*, 1 Burr. 556; per 653; *R. v. Holland*, Id. 692.
Cur. in R. v. Cox, 2 Burr. 787; *R. v.*

THE KING v. RUDGE.

AN attachment was granted against a bailiff (v), for refusing to make an affidavit of the service of a *subpoena* upon one Henry Long, to appear, and give evidence to the grand jury at Worcester Assizes upon an indictment for perjury; which

A bailiff is bound to make affidavit of the service of process when required.

(v) Reg. M. 1634; Tidd's Pr. 52, (ed. 1821).

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affidavit was necessary, in order to found a motion for an attachment against Long (u), for his non-appearance there. For a bailiff is in a very different situation from another man, being an officer of this Court; and if such refusals were justifiable, and it were left to the bailiff's option, to prove or not to prove the service at his pleasure, parties who apply for justice would be in a very unsafe situation.

(u) Which is the usual practice in K. B. *Hammond v. Stewart*, Stra. 510; *Wyatt v. Warkworth*, Id. 810; *Small v. Whitmill*, Id. 1054; per Lord Mansfield in *Pearson v. Iles*, 2 Doug. 561; *Bowles v.*

Johnson, ante, 36. But it is not so much a matter of course in C. P. See *Blandford v. De Tastet*, 5 Taunt. 260; *Horns v. Smith*, 6 Taunt. 9, 1 Marsh. 410.

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OVER-NORTON v. SALFORD, OXON.

S. C. Burr. Sett. Ca. 516.

When the father purchases for less than 30*l*., and resides thereon, and still continues to reside, but the children leave him: they are not settled in that place. [*Post*, 455.]

PETER White the younger, and Mary his wife, were removed by order of two justices from Salford to Over-Norton, as likely to become chargeable (w) to the former, and as being last legally settled in the latter. On appeal, the Sessions discharge this order, and state specially, "That Peter White, the pauper's father, being settled in Over-Norton, in 1726, for the consideration of 29*l*. purchased a tenement in Salford of one Lardner, whose wife was seised thereof in fee, but [who] never joined in any conveyance thereof, nor concerned herself about the tenement, though she survived her husband (who died in 1732) ten years. That Peter White has lived in the said tenement uninterruptedly ever since the said purchase, and still lives therein. That in 1730, the pauper was born there, and lived with his father therein till about 1754, when he married and left his father's family, and lived in a separate tenement at Salford, without having gained any settlement but what he derived from his father."

In Easter Term last, *Norton*, Solicitor-General, moved to quash the order of Sessions, and confirm that of the justices; because under the statute 9 Geo. 1 (x), the father gained (as

(w) But now by 35 G. 3, c. 101, all persons are irremovable, until they become *actually* chargeable, except, 1st, persons convicted of felony; 2dly, rogues and vagabonds; 3dly, unmarried women with child, who shall be deemed chargeable. See *R. v. Tibbenham*, 9 East, 388; *R. v. Inskip-with-Sowerby*, 5 M. & S. 299; *R. v. Lale*, 2 B. & A. 149.

(x) C. 7, s. 5: by which it is enacted, that no person shall gain a settlement by virtue of any purchase of any estate, &c., whereof the consideration doth not amount to the sum of 30*l*. bond *fade* paid, for any longer time than such person shall inhabit on such estate; and shall then be liable to be removed to the place where he was last

legally settled. Purchase is used in its popular sense, denoting a purchase for money; *R. v. Marwood*, Burr. S. C. 384. Where the consideration expressed in the conveyance was 28*l*., parol evidence was admitted to prove that 30*l*. was the real consideration; *R. v. Scammonden*, 3 T. R. 474. A grant of a copyhold with one shilling fine, one shilling heriot, and one shilling rent, is a purchase within the statute; *R. v. Warblington*, 1 T. R. 241; so a grant of a copyhold paying a quit-rent of 2*s*. 6*d*. per annum; *R. v. Hornechurch*, 2 B. & A. 189. A clear and absolute equitable estate will confer a settlement; but a mere equitable right will not; *R. v. Toddington*, 1 B. & A. 560; *R. v. Berke-*

he asserted) no settlement by this purchase, the consideration money being under 30*l.*, and therefore could communicate none to his children.

And now *Morton*, *Blackstone*, and *Carter*, shewed for cause.

1. That, whether permanently settled or not, it is sufficient to support the present order, if the pauper is not *now* removeable. In *Athrop Ruding* and *White Ruding*, M. 30 Geo. 2(y), the wife was held not to be removeable from A., and yet her settlement continued in B. 2. That the son's settlement being hitherto merely derivative, must depend on his father's. If the father's *present* settlement is at Salford, the son's *present* settlement is there also. 3. That the father's settlement, by the purchase in 1726, and forty days' residence, was in Salford, when the pauper was born;—has continued so ever since; *—and remains to this hour in Salford. Indeed, under statute 9 Geo. 1, this settlement will determine, if ever he removes from his purchase. But till then, Salford is his *only* settlement; for no man can have two at once. Before the statute, residence for forty days in the parish after any purchase gained a settlement, which after fifty years' absence might be resorted to, if no new settlement were acquired. So the law continues in purchases of 30*l.* and upwards; but in purchases under 30*l.*, when the purchaser quits the occupation, the statute destroys the settlement. It does not prevent the gaining a settlement by such a purchase; but makes it a defeasible settlement, by subjoining to it a *condition subsequent*, that of perpetual residence. He gains the settlement by the old law before the statute;—the statute only limits its duration. He shall gain it, “for no longer time than he shall inhabit thereon;” and “he then shall be liable to be removed,” *vis.* after the condition of perpetual residence is broken; consequently he was not so before. And he shall be removed “to his *last* legal settlement before the said purchase;” *i. e.* on the defeating the new settlement, the former shall revive; but it did not subsist during the inhabitancy, for then the statute would have only said “to his legal settlement.” 4. This differs from the case of certificate-persons, for there the statute (9 & 10 W. 3)(x), contains an express negative: “He shall acquire no settlement, unless by two specific methods.” Here the law permits the acquisition of the settlement, and only regulates its duration;—if it never is acquired, it could not have endured an instant. 5. If during the father's residence at Salford, his children born there are settled at Over-Norton, then he gives them a settlement, which he has not himself;—and this inconvenience will also follow; that his children, after seven years old, may be taken from him and removed to Over-Norton. 6. As to the inconvenience that might arise, if a father should reside till his death on a trivial

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well, 1 B. & C. 542; *S. C.* 3 D. & R. 9; *R. v. Geddington*, 2 B. & C. 129, 3 D. & R. 403, where all the cases are referred to.

(y) *Burr.* S. C. 412; and see *Leach v. Blackfordby*, *post*, 466; *Dunchurch v. South Kilworth*, *post*, 597.

(x) C. 11.

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purchase, and thereby fix a burthensome family on the parish;—or if, as in the present case, a child is forisfamiliated during his father's residence, and thereby perhaps rendered incapable of changing his settlement, if his father should hereafter remove;—these are grievances, for which, if the statute has given no remedy, the Court cannot give it. The statute has relieved parishes in one instance, *viz.* the absence of the purchaser after residence on a trivial purchase. It has left other cases as it found them. Under such a purchase as this, ten daughters might indisputably gain settlements by a descent in coparcenary; or ten sons, by a devise to them all in common. 7. Statutes in bar of settlements have always been strictly construed; and in particular this clause of 9 Geo. 1. A man who mortgages the estate to raise the consideration money has been held a *bond fide* purchaser (a).—And purchases under this statute are confined to acquisitions by sale only; and extend not to those by settlement, gift or devise. 8. Lastly, as it is stated that the original title was bad, Carter urged, that this was not to be considered as a purchase for 29 $\frac{1}{2}$ l., that transaction being void; but that White's was a title commencing by disseisin, and so not within the statute 9 Geo. 1.

Norton, Solicitor-General, in support of the rule, insisted, that the only question was, whether a son, emancipated, and living separate from his father, should have a right to stay in the parish where his father resides, or be sent to his own legal settlement. That if the son be not now removeable, he never can be so; for, according to the doctrine in *East Woodhay* and *West Woodhay* (b), if a child ceases to be part of his father's family, and the father afterwards changes his settlement, the new settlement shall not go to the son. That the original settlement at Over-Norton never was discontinued, or so much as suspended; for that a purchase under 30 $\frac{1}{2}$ l. does not give any settlement, but a mere personal privilege of residence. That it would make wild work in parishes, if by a purchase of 40s. value, and residence thereon, a burthensome family might be brought upon the parish. That if the father himself should cease to reside on the very spot, he might instantly be removed to Over-Norton:—*A fortiori* the son is liable, for he has ceased to reside there, is emancipated, and has left his father. That if the doctrine now contended for should prevail, and the father should remove and alter his own settlement; yet the two pa-

(a) *R. v. Tedford*, Burr. S. C. 57; *R. v. Chailey*, 6 T. R. 755. But where the pauper purchased a messuage for 52 $\frac{1}{2}$ l. under an agreement that the vendor should allow 40 $\frac{1}{2}$ l. of the purchase-money to remain upon mortgage, and such mortgage was accordingly made, and 12 $\frac{1}{2}$ l. only paid by the pauper to the vendor, who kept the title deeds in his hands, but the pauper took possession and resided in it some years, but was unable to pay the rest of the purchase money, and afterwards agreed to sell it to B. for 60 $\frac{1}{2}$ l., who thereupon paid

the 40 $\frac{1}{2}$ l. to the original vendor, upon his delivering up to him the title deeds and the remaining 20 $\frac{1}{2}$ l. to the pauper, on the execution of the conveyance to him, at which time the pauper quitted the messuage, not having resided on it forty days after the payment of the 40 $\frac{1}{2}$ l. to the original vendor; it was held, that the pauper did not gain a settlement by residence on such estate; *R. v. Olney*, 1 M. & S. 387; *R. v. Mattingley*, 2 T. R. 12, *acc.*

(b) *Sura*. 438.

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ishes would be concluded in respect of the son by the * confirmation of this order of reversal. But if the father has no permanent settlement, much less can the son be supposed to have one, who derives all he has from the father. As for the title by disseisin; after thirty-six years' quiet possession the law will not presume a wrong, but rather presume a right, in the present possessor.

Lord MANSFIELD, C. J., lamented the unhappy policy of our present poors-law, which (after thirty-six years' residence of a man in a parish, which had had all the benefit of his vigour and labour) now rendered it a very doubtful point, where he and his family were to be settled. He would take a day's time to consider it.

Afterwards, the last day of the Term, *Norton*, Solicitor-General, moved for the judgment of the Court; but was told, they had not formed their opinions; so it was adjourned over till Michaelmas Term, but with this proviso, that the costs of maintaining the pauper from this day, should attend the event of the cause,

[*Post*, 455, S. C.]

LORD v. COOKE.

MOTION to put off a trial, on the usual affidavit (c) of the absence of a material witness, who was gone to the East Indies, and not expected home under eighteen months. The Court would not grant the rule *nisi*, unless the defendant would engage to make a special case, stating the nature of the demand, and what it was the witness could prove. Which being accordingly done, the Court thought it not sufficient to stay the trial; and therefore discharged the rule that had been obtained to shew cause (d).

Where witness will be absent 18 months, a special case is requisite to put off a trial for want of his evidence.

(c) *Viz*: "That E. F., late of —, is a material witness for him this deponent in the said cause, as he is advised and verily believes, and that he cannot safely proceed to the trial thereof without the testimony of him the said E. F.:" and then stating that he had caused enquiry to be made after him, the result of the enquiry, and the time when he is likely to attend. It should regularly be made by the defendant, but has been allowed to be made by his attorney; *Duberly v. Gunning*, Peake's N. P. C. 97; or even a third person, *Day v. Samson*, Barnes, 448; but not by the at-

torney's clerk, unless he has the management of the cause, and is acquainted with the particulars, *Sullivan v. Magill*, 1 H. Bla. 637. It is said, that in C. P. the deponent must state *absolutely* and not to his belief only, that the person is a material witness; *Day v. Samson*, *ubi supra*; *Eyre v. —*, Pr. Reg. C. P. 402. And the Court will not put off a trial, if the defendant has acted unfairly, or been himself the cause of delay; *Saunders v. Pitman*, 1 Bos. & P. 33.

(d) See *R. v. D'Eon*, *post*, 514, & n. (k).

COMBE *qui tam* v. PITT.

S. C. 3 Burr. 1423.

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DEBT *qui tam* for 1500*l.*; being three penalties incurred under the statute for bribery at the last Ilchester election in 1761. Defendant pleads in abatement, that another action of the same

Against a popular action the defendant cannot plead an-

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other action in
the same Term,
but must shew
the other action
to be actually
prior in time.

sort was brought in the same Term by one Lake, which is still depending; and avers, that the facts alleged in both the bills are the same. Plaintiff replies, that on 30th June, 1762, he sued out a *latitat*, which was served on the defendant the 29th of July, and that his bill was filed on the first return in Michaelmas Term.—Defendant rejoins, that, on the same 30th of June, Lake sued out his writ of *latitat*, which was served on the defendant the 7th of July, and his bill was also filed on the same first return day in Michaelmas Term.—Plaintiff sur-rejoins, that, in fact and truth his own writ was sued out on the 1st of July, and Lake's on the 3d, though both were, according to the usage and practice of the Court, being sued out in vacation, tested on 30th June, being the last day of the preceding Term. To this the defendant demurs generally, and also specially, for that the sur-rejoinder, which avers the suing out of the writ to be on the 1st of July, is a departure from the replication, which avers it to have been sued out on the 30th of June.

In support of this demurrer, *Dunning*, for the defendant, argued

1st. That there is not a sufficient priority in the plaintiff; both writs being legally sued out at the same time. And cited *Pye and Cook*, T. 1 Jac. 1, Moor. 864, Hob. 128; *Hutchinson and Thomas*, 2 Lev. 141; *Jackson and Gisling*, 15 Geo. 2, ill reported, 2 Stra. 1169; but (as appears from a manuscript of the counsel who argued it) the Court established a distinction therein, between pleas in abatement, and pleas in bar. That, where another action pending is pleaded in bar, you must shew the priority of the real day; as in 2 Lev. (e). But where it is pleaded in abatement, as in *Hobart and Moor*, there you need not; for their only effect, if they are sued out *eodem instanti*, will be to abate each other. He allowed, that in *case of the statute of limitations or a plea of tender before action brought, which are favourable cases, the Court will allow the true time to be averred, when the writ was sued (f). But this is the case of a common informer upon a penal action, which the Court will never aid. And so is *Holt's* opinion in *Culliford and Blandford*, Carth. 234 (g). Therefore, (even putting the service of the writ out of the case, in which Lake had a manifest priority) the writs are both in law sued out the same day, are returnable the same day, and the bills are filed the same day; the consequence of which is, that they mutually abate each other. 2dly. The change of the day upon the pleadings is such a departure, as is a defect in substance as well as in form; *Cole and Hawkins*, 1 Stra. 21 (h).

Yates, for the plaintiff, insisted, that it is not incumbent on the plaintiff, to shew a priority; but on the defendant, who sets

(e) There the defendant pleaded in bar to an information for usury, a judgment obtained against him in an information for the same offence, exhibited in the same Term.

(f) *Ante*, 320.

(g) *S. C.* 1 Snow. 353; 4 Mod. 129;

Holt, 522; *Comb.* 194; *S. C.* in error, cited 1 Ld. Raym. 78, where a majority of the judges held, that penal acts are not extendible by equity.

(h) *Tyler v. Wall*, Cro. Car. 228; *Stone v. Bale*, 3 Lev. 348; 2 Wms. Saund. 84, n. (1); *Com. Dig. Placitor* (F 7. 11).

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up the plea, to shew the priority of Lake. And he cited *Johnson* and *Smith*, P. 33 Geo. 2(s), that, to effectuate the statute of limitations, the true time of suing out the writ may be averred.—That Lake is a common informer as well as Combe; and the Court will not aid one more than another.—That, in *Culliford* and *Blandford*, three Judges concurred against *Holt*. That the plaintiff was guilty of no laches, as he served the writ before the day of the return. That if this doctrine should prevail, a man might evade any penal statute by getting a friend at the end of every Term to sue out a writ and serve him, by which means he may gain a priority, or at least a parity, with all other men. 2. This is no departure; for here is no fact shewn that is inconsistent with, but merely explanatory of, the former.

In the same Term, Lord MANSFIELD, C. J., gave the judgment of the Court.

It is not necessary to go into any of the pleadings after the plea; for that being bad, the rest will fall of course. The plea, which is in abatement, sets forth another action in the same Term. Now a defendant, who is to defeat an *informer of the right of suing, must shew a prior right attached in somebody else. This is proved by the cases in 2 Lev. 141, *Hutchinson* and *Thomas*, that, notwithstanding the general fiction of law, you may aver the particular day in order to shew your priority; and Stra. 1169, *Jackson* and *Gisling*, (which *Dennison*, J., said appeared from his notes to be well reported). As for the distinction attempted between pleas in abatement and bar, it will not hold. The Court can as easily see, that one writ is prior to the other, as that both are sued out in the same instant. As to the case in Hob. 128, we are of opinion, that what is there put is a mere creature of the imagination, like a point in mathematics. We even think, that not only the day, but the very time of the day, may be averred, in order to determine the priority(k), as they always mark the hour in the Register's Office. So that there never can be two actions brought at exactly the same identical time. On the authority therefore of the cases in *Levinz* and *Strange*, our judgment is, that the defendant

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Respondet Ouster (l).

[Post, 523, S. C.]

(f) *Ante*, 215; see also *Morris v. Harwood*, *ante*, 320; *Hart v. Weston*, *post*, 683; *Leadbeater v. Markland*, *post*, 1131.

(k) *Ante*, 71, n.

(l) As to pleading another action pending in abatement, see *Sparrie's Ca.*, 5 Rep. 61; *Boyce v. Douglas*, 1 Camp. 60; 2

Hawk. P. C. c. 26, s. 63; Bac. Abr. *Abatement* (M); Com. Dig. *Id.* (H 24). In one case, indeed, it is said, that to debt on 5 Eliz. c. 4, the pendency of a prior action must be pleaded in bar, and cannot be pleaded in abatement; *Baines v. Blackburne*, Bay. R. 216.

The KING v. DELAVAL *et al'*.

S. C. *Ante*, 410.

LORD MANSFIELD, C. J., delivered the opinion of the Court.
—Upon the new affidavits which have been laid before us, the

Information granted for a confederacy by

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a master, an attorney, and a gentleman, to assign over a female apprentice by her own consent for the purpose of prostitution.

father has fully justified himself, and appears to be an innocent and an injured man. In respect to the indenture of apprenticeship, it is so gross upon the face of it, that a Court of justice cannot but animadvert upon it. It is plainly calculated for the purpose of prostitution only. * Though there are species of indecency and immorality, particularly in cases of incontinency, which are confined to the Ecclesiastical Courts, (and I am very glad they are so); yet the general inspection and superintendence of the morals of the people belongs to this Court, as *custos morum* of the nation. So laid down in *Curl's Case* (m), and before that, in *Sir Charles Sedley's* (n). Especially, when the offence is mixed with confederacy and conspiracy, as in the present case. Bates, the master, stands in the worst light of all; by taking the girl as his apprentice, he was *loco parentis*, yet he is privy to the fact of her living all the winter in a state of prostitution, and gives no intimation of it to her father. In February, indeed, he tells him she neglected her lessons, and had been riding in the Park with Sir Francis Delaval's servant. In April comes on the transaction now complained of; into which Bates readily enters without consulting the father, upon the single authority of a girl, whom he had reason to suspect, and who told him her father approved of it. He appears by his conduct, and from comparing the affidavits of the girl with his own, to have intended to favour her going to live with Sir Francis, though in his affidavit he has positively denied such intention. The next in degree of guilt is Fraine the attorney, whom I have formerly known in business to be a man of a fair character. But he has knowingly drawn this deed. And, if a gentleman of the profession will advisedly engage in such a thing, for such a purpose, the Court must animadvert upon it. Sir Francis Delaval has in the whole affair acted very ill, as well as very unwisely. His only plea is a very poor one, that the woman tempted him, and he complied from his regard to her. The rule for an information was made absolute against all three; Delaval, Fraine, and Bates (o).

(m) 2 Stra. 788.

(n) Sid. 168; 1 Keb. 620, *S. C.* See *R. v. Crunden*, 2 Camp. 89; and 4 Bla. Com. 64; 1 Hawk. P. C. c. 5, s. 4.

(o) An information was granted for a conspiracy in soliciting a young lady to desert her father, and to commit whoredom and adultery with one of the defendants, who was her brother-in-law, and to live and cohabit with him; and the defendants were found guilty, though there was no evidence of force being used, and though it appeared that the young lady concurred; *R. v. Lord Grey*, 3 Harg. St. Trials, 519; 1 East, P. C. 460. So an information was granted for a conspiracy in inveigling a young woman, a ward of Chancery, of 16 years of age, from her guardian, and marrying her; though she voluntarily went to be married; *R. v. Pierson*, Lord Ossulston and Others, Andr. 310; 2 Stra. 1107; and

the Court said, that the taking away a young woman under age, against the consent of her father, though it be without force, and with her own consent, is certainly punishable at common law; as appears by *R. v. Twisleton*, 1 Sid. 387, 1 Lev. 357, in which case there was no proof of any seducements, but common compliments among young people. See also an information for conspiracy to marry a young man, a minor, to a woman of ill name and of no fortune; alleging that the defendants by divers false allurements, did compel him to be drunk with strong waters and other liquors, and then introduced the woman into his company; *R. v. Thorp*, 5 Mod. 221, 1 Com. R. 27; *R. v. Blacket*, 7 Mod. 39, S. P. As to conspiracies, see *R. v. Persons*, ante, 392; as to granting informations, see *R. v. Kinnerley*, ante, 294; *R. v. Robinson*, post, 541.

SITTINGS AFTER TERM.—5 JULY, 1763.—LONDON.

HOOPER v. SMITH.

ONE Hooper, a tradesman in London, was indebted *bonâ fide* to his mother the plaintiff to the amount of 800*l*. His circumstances declining, he (having previously discharged his journeyman the Saturday before on pretence of going into another way of business) on Monday, 17 January, 1763, at eight o'clock in the morning, assigned to his mother a parcel of silks amounting in value to about half of his stock in trade, and made out a bill of parcels with a receipt and a discount as for prompt payment, as if sold to her in the ordinary course of business. These were conveyed the same morning in a hackney coach to the mother's lodgings at Hackney. In the evening he had a meeting with his principal creditors; when, upon examining his circumstances, it was agreed that he should immediately commit an act of bankruptcy by denying himself to one of them, which was accordingly done and a commission taken out. Afterwards the assignees under the commission got possession of these goods by a stratagem, and sold them for 343*l*. 11*s*. 6*d*. Upon which, Mrs. Hooper brought trover against the assignees.

A trader may lawfully assign part of his stock in favour of a particular creditor, the same day on which he afterwards commits an act of bankruptcy.

It was objected on the part of the defendants, that this was a fraudulent assignment under the colour of a sale, transacted in direct contemplation of Hooper's becoming a bankrupt, and therefore void. And it was compared to the Case of *Compton and Bedford*, Hil. Vac. 2 Geo. 3 (*p*); and a more recent case, where an apothecary made over his effects to a chymist, his creditor, four days before he became a bankrupt, and the jury found it fraudulent and void.

But by Lord MANSFIELD, C. J.—There is no arguing from general verdicts, unless all the circumstances could be minutely remembered. The rule of law is clear and established. If a man, not having previously committed any act of bankruptcy, in order to pay even a just debt, assigns *all* his effects to the *creditor;—or all but some colourable part; (which was the Case of *Compton and Bedford*)—or all, to several creditors, but in total exclusion of any one or more of them;—this in itself would make him a bankrupt; it would be the very act of bankruptcy (*q*). But a preference to one creditor, especially by

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(*p*) *Ante*, 362.

(*q*) A conveyance by *deed* of all the effects of a bankrupt under any circumstances was in itself an act of bankruptcy, under 1 Jac. 1, c. 15, s. 2, (previous to the passing 6 G. 4, c. 16), which enacts that "every person, who shall make any fraudulent grant or conveyance of his lands, tenements, goods, or chattels, to the intent or whereby his creditors shall or may be defrauded or delayed for the recovery of their just and true debts, shall be accounted and adjudged a bankrupt." See *Worseley v.*

Demattos, 1 Burr. 467; *Wilson v. Day*, 2 Burr. 827; *Hassels v. Simpson*, 1 Doug. 89, n.; 1 Bro. C. C. 99, S. C. in Canc.; *Butcher v. Easto*, 1 Doug. 295; *Dutton v. Morrison*, 17 Ves. J. 193; *Eckhardt v. Wilson*, 8 T. R. 140; *Tappenden v. Burgess*, 4 East, 230; *Newton v. Chantler*, 7 East, 138; *Kettle v. Hammond*, 1 Co. B. L. 89; see also *Edwards v. Harben*, 2 T. R. 592. But a partial conveyance only of a trader's property, as observed by Lord *Ellenborough* in *Newton v. Chantler*, is open to a different consideration: under

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assigning only part of his goods, and to pay only part of the debt, has been frequently held to be good (r); particularly in *Cock* and *Goodfellow(s)* (the case of a parent and child), *Small* and *Oudly(t)*, and others. Indeed, if a man makes over so much of his stock in trade, as to disable himself from being a trader, this would be fraudulent. It would be, as I said in *Compton* and *Bedford*, an assignment of his solvency. An assignment of all his household goods would be the same; for a man can't go on without them. But is half such a part of a man's stock as must necessarily have this effect? This would be going beyond any case that has yet been determined. Suppose, he had sold the goods in question to John or Thomas, and with that ready money had paid his mother part of her debt; would that sale or payment have been void?

I also much doubt how far such an act of bankruptcy, committed by consent and agreement, is valid, with respect to a third person not privy to such agreement. Certainly the bank-

some circumstances it may constitute an act of bankruptcy; as where it is manifestly fraudulent, when made to give particular creditors a preference,—or in contemplation of bankruptcy,—or if it be in fact a conveyance of all the effects, with only a colourable exception of part. See *Gayner's Ca.*, cited 1 Burr. 477; *Linton v. Bartlett*, 3 Wils. 47; *Harman v. Fishar*, 1 Cowp. 124, and *Rust v. Cooper*, Id. 633, per *Ld. Mansfield*; *Round v. Hyde*, 1 Co. B. L. 105 (ed. 1817); *Pulling v. Tucker*, 4 Barn. & A. 382;—*Devon v. Watts*, 1 Doug. 86; *Morgan v. Horseman*, 3 Taunt. 241;—*Compton v. Bedford*, ante, 362; *Law v. Skinner*, post, 996. But under some circumstances a fair conveyance of part has not been considered to constitute an act of bankruptcy: see *Cock v. Goodfellow*, and *Small v. Oudley*, ut *infra*; *Jacob v. Shepherd*, cited 1 Burr. 478; *Unwin v. Oliver*, Id. 481; *Manton v. Moore*, 7 T. R. 67; *Berney v. Davison*, 1 Brod. & B. 408, 4 B. Mo. 126, S. C., where the principle deducible from the cases is laid down by *Lens*, Serj. *arguendo*. If the conveyance be not by deed, though it will be void, yet it will not constitute an act of bankruptcy; *Martin v. Pevetress*, 4 Burr. 2477; *Rust v. Cooper*, 2 Cowp. 629; “A conveyance of goods, without deed, is fraudulent, unless possession of the goods be given: if it be by deed, it is fraudulent, and an act of bankruptcy;” per *Lord Kenyon*, 7 T. R. 71; *Back v. Gooch*, Holt's N. P. C. 16, 4 Camp. 234, S. C. per *Gibbs*, C. J. See also *Alderson v. Temple*, post, 660, and cases there referred to. A fraudulent surrender of a copyhold was held not to be an act of bankruptcy; *Ex parte Cockshott*, 3 Bro. C. C. 501; but it is now declared to be so, by 6 G. 4, c. 16. As to the assignment of book-debts, see *Ex parte Richardson*, 14 Vea. J. 186.

These cases are all prior in time to the

6 G. 4, c. 16, s. 3, which enacts, “that if any trader shall make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or any fraudulent surrender of any of his copyhold lands or tenements, or any fraudulent gift, delivery or transfer of any of his goods or chattels,” he shall be deemed to have committed an act of bankruptcy.

(r) It may be questioned, whether this opinion, delivered only at *Nisi Prius*, can be considered as an authority. For, in *Worsley v. Demattos*, 1 Burr. 478, (decided before this case indeed, but where the cases of *Cock v. Goodfellow*, and *Small v. Oudley* are commented upon,) *Lord Mansfield* is reported to have said: “It has been argued, that after a resolution to commit an act of bankruptcy, the trader so resolving to become bankrupt, might lawfully prefer a just creditor by conveying part of his effects to satisfy that creditor's debt. It is not necessary to determine that question in this cause, for here the conveyance is of all: and therefore I will only say, that no such proposition is yet established; much less in the extent where-to it has been urged.” It also seems contradicted by the Cases of *Linton v. Bartlett*, 3 Wils. 47; and *Devon v. Watts*, 1 Doug. 86; *Morgan v. Horseman*, 3 Taunt. 241; and *Pulling v. Tucker*, 4 Barn. & A. 382. Moreover, it does not appear, whether the jury found for the plaintiff on the ground of the assignment being valid, or on the ground of there having been only a concerted act of bankruptcy.

(s) 10 Mod. 489, cited in 1 Burr. 478.

(t) 2 P. Wms. 427, cited also in 1 Burr. 480: that case has been considerably shaken by that of *Linton v. Bartlett*, 3 Wils. 47, and see *Lord Mansfield's* observations upon it, Cowp. 123.

rupt himself, and all those who come in under the commission, are concluded to say any thing against it (v). But the relation of a commission of bankrupt to the time of committing the act, though useful to prevent frauds, is sufficiently hard already upon private persons; and ought not to be extended farther. An act of bankruptcy in the eye of the law is considered as a crime;—but where is the crime of denying oneself to another, by previous consent and agreement?

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Verdict for the plaintiff.

(s) *Bamford v. Baron*, 2 T. R. 594, n. parte *Bismar*, 1 Madd. 250; *Back v. (a)*; Ex parte *Bourne*, 16 Ves. J. 148; Ex *Geoch*, Holt, N. P. C. 13; 4 Camp. 232; parte *Gouthwaite*, 1 Rose, B. C. 87; Ex *Hicks v. Burfitt*, Id. 235, n.

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THE KING v. The Minister and Churchwardens of St. BOLTOLPH, Bishopsgate.

MORTON moved for an information against the Minister, &c. who had collected upwards of 14*l.* on a brief, for the sufferers by fire at Alborne, in Wilts, and had spent about 9*l.* at tavern entertainments, and then returned upon the back of the brief, that 5*l.* 3*s.* 4*d.* only was collected, and signed their names to such certificate. But the Court, Lord MANSFIELD, DENNISON, and WILMOT, denied a rule to shew cause, and referred the prosecutors to the ordinary remedy by indictment (a).

Information for embezzling money collected on a brief refused.

(a) See the form of an indictment for a conspiracy to embezzle money collected by a brief, in Cro. Clr. Co. 136, (ed. 1811); and though an indictment will lie for such a conspiracy, *quære*, whether it will lie for the fraud simply: see *R. v. Wheatley*, ante, 276, n. (p). As to briefs, see 4 Ann. c. 14.

BRERY *qui tam* v. LEVY.

INDICTMENT (b) on the Coal Act for selling short measure. Defendant was found guilty, after which, *Wallace* moved for leave to compound with the prosecutor. But his motion was denied: for the king's moiety of the penalty is vested by the conviction, and then it is too late to compound (c).

A popular indictment not to be compounded after conviction.

(b) This must be incorrect: it must have been a *qui tam* action, and not an indictment.

(c) See *Brown q. t. v. Bailey*, 4 Burr. 1929; *Wood q. t. v. Ellis*, post, 1154; and *Wood q. t. v. Johnson*, post, 1157.

TRINITY v. ST. PETER's in Dorchester.

S. C. Burr. S. C. 513.

Hiring to work
by the piece or
gross, and five
years' continu-
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ance upon that
contract, no set-
tlement.

JOHN Milwood, his wife, and three children were removed from Trinity to St. Peter's by order of two justices. St. Peter's appeal, and the Sessions confirm the orders, stating specially; that the pauper was settled in St. Peter's by * derivation from his father, who died in the pauper's infancy, and at six years old his mother married again to one Oldis, in the parish of Trinity, who maintained and employed the pauper in his trade of button-making, without any wages or contract; that, when the pauper was sixteen, he left his father-in-law and went to Bristol to seek for a more advantageous situation, but, returning soon after, Oldis agreed with him to let him live in his house, and give him 1s. a gross for what he should earn at button-making, deducting thereout 5s. a week for his board and lodging: upon this agreement they continued for five years, both parties understanding that each was at liberty to be off at pleasure.

Norton, Solicitor-General, insisted, that here was no hiring for a year: and if this amounts to a settlement, all journeymen who work by the piece will equally be entitled to gain one.

Thurlow and Dunning, *contra*, argued, that this was a hiring; and, being indefinite, must be construed a hiring for a year.

LORD MANSFIELD, C. J.—Where there is not a hiring in express words, but the nature of the service implies a precedent hiring, the Court will go far to presume one. But this is exactly the case of every workman paid by the piece. And it is very clear, that there is no hiring for a year, either express or implied (*d*).

Confirm the orders.

(*d*) See *R. v. Weyhill*, *ante*, 206. So, where a pauper agreed to serve as a brick-maker from Michaelmas to Michaelmas, and to make 70,000 bricks at a certain price, he did not gain a settlement, on the ground that it was only a contract for that job, and not for a year's service absolutely; *R. v. Woodhurst*, 1 B. & A. 325. But where there is an express yearly hiring, or

one can be inferred, it is no objection to gaining a settlement, that the pauper was to be paid by the piece; as where the pauper hired for a year to spin wick-yarn at 1s. 6d. a stone; *R. v. King's Norton*, Burr. S. C. 152; to work for a screw-maker,—good earn, good hire,—to make screws at so much a gross; *R. v. Birmingham*, 1 Doug. 333.

SMITH v. SCANDRETT.

Having no ef-
fects in England
is not an objec-
tion to bail, with-
out other suspi-
cious circum-
stances.

ONE Gobel offered to justify as bail for 1600*l*. the debt sworn to; but it appearing, that though he had a fortune in Antigua, yet he had no effects in England, and had nine actions depending against him for the amount of near 3000*l*., the Court set him aside: but declared, that the merely having no effects in England was not of itself a sufficient objection, with-

out other auxiliary circumstances; this Gobel having formerly been allowed as bail in this Court, on making affidavit that he was worth 9000*l.* in Antigua(e).

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(e) *Boddy v. Leyland*, 4 Burr. 2526; *Wightwick v. Pickering*, Forrester, 38, cont. Bail allowed to justify in respect partly of cash, and partly of a freehold house at Gibraltar; *Beardmore v. Phillips*, 4 M. & S. 173. So, a native of England allowed to justify partly in respect of a landed estate in Surinam, and partly in respect of property in England. But *Bayley*, J.,

there observed, after citing this case, and *Boddy v. Leyland*, that it must not be taken for granted, that a party can justify in respect of property abroad, when he has no other property; *Graham v. Anderson*, 4 M. & S. 371. These were cases of natives; as to foreigners, see *Christie v. Fulkeul*, post, 1323.

GUICHARD v. ROBERTS.

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ACTION on a note of hand. On the trial the defendant gave in evidence, that the note was obtained upon a smuggling consideration(f); on which the jury found a verdict for him. On a motion for a new trial, Lord MANSFIELD was strongly of opinion, that such evidence should not have been admitted; and took a difference, where the plaintiff alleges the *turpis causa* as the ground of his action, and where the defendant sets it up as the ground of his defence: in both which cases, he denied that either party should avail himself of his own wrong; and granted a rule to shew cause.

Defendant may set up an illegal consideration against an action on a note of hand.

But afterwards, in the close of the Term, the cause being compromised, Lord MANSFIELD took it up again *mero motu*; and declared, that it was now the clear opinion of the whole Court, that on this action an illegal consideration might clearly be set up as a defence; and they did not see why it might not be done on an action of debt on bond(g). For every creditor ought in justice to prove the consideration on which his contract is founded; and, though the law allows bonds and notes to be *prima facie* evidence of a good consideration without proving it on the part of the plaintiff, yet it ought not to preclude the defendant from shewing, that the consideration in fact is a bad one.

(f) See ante, 259, n. (w).

259, n. (w); *Falkney v. Reynolds*, post, 633;

(g) See *Lightfoot v. Tenant*, 1 Bos. & P. 551; *Robinson v. Bland*, ante, 234, &

and *Bayley on Bills*, 232 (ed. 1813).

THE KING v. BANKES and Others.

S. C. 3 Burr. 1452.

RULE to shew cause why a *mandamus* should not go to the lord of the manor of Corfe Castle to hold a Court Leet, and to certain jurors (who had been summoned to attend at a court appointed to be held on 25th October last) to appear, and form a jury, in order to elect a mayor. It appeared on the prosecutor's affidavits, that one John Price had been *de facto* elected

In rules for a *mandamus* to elect a mayor, a subsisting mayor *de facto* must always be a party.

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mayor on 29th October, and had acted as such, but his name was not in the rule.

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Morton shewed for cause, that the rule could not proceed till Price was inserted therein, and had been served, he being *materially interested in the event of the question; and cited the *King and Scawen (h)*, mayor of Mitchel, in Cornwall; *coram Rider*, C. J., Mich. 1753, where the omission of the subsisting mayor (in a rule to shew cause against a *mandamus* to elect another) was allowed to be sufficient cause why the *mandamus* should not go. And upon this precedent, as well as upon the reason of the thing, the Court enlarged the rule till next Term, and ordered Price's name to be inserted therein.

[S. C. Post, 452.]

(h) See 3 Burr. 1458.

RIGHT on demise of BASSET v. THOMAS and Another.

S. C. 3 Burr. 1441.

Leasing powers to be liberally construed; and therefore land settled for years determinable on lives, by a family settlement, shall be said to have been thereby usually demised.

IN ejectment, at the Summer Assizes for Cornwall, 1761, a verdict was found for the plaintiff, subject to the following case:—

John Pendarves Basset, by marriage settlement, 11th and 12th April, 1737, conveyed to trustees divers manors, &c. to the use of himself for life, and so on to his intended wife and issue, in strict settlement; remainder to such uses as he should appoint; remainder (if no appointment) to himself in tail; remainder to his brother, Francis Basset (lessor of the plaintiff), in strict settlement; remainder to himself in fee: with power to the several tenants in possession, or to the trustees, during their minority, by any deed or deeds, with two credible witnesses, to lease for one, two, or three lives, or for years determinable on one, two, or three lives, any part of the premises, which had been *usually so letten*, so as such rent as had been given for twenty years past, or a proportionable part should be reserved thereon; and all usual covenants inserted therein, and with other usual provisoes. The marriage took effect, and said John Pendarves Basset died 19th September, 1739, leaving his wife *enseint* of a son, born 22d May, 1740, and having made no appointment.

On 24th June, 1742, said trustees (with the approbation of a Master in Chancery) demised to Nicholas Tresidder the premises in question in consideration of 175*l.* for ninety-nine years, *determinable on three lives, at the rent of 13*s.* 4*d.* *per annum*, with usual covenants, &c. On 17th November, 1756, John Prideaux Basset, the son, died intestate, and unmarried, whereupon the premises in settlement vested in Francis Basset. It appeared in evidence, that 21st June, 24 Hen. 8, the premises (with others) were let to John Killebrew for 55 years:—That

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on the 20th of October, 18 Eliz. the same were demised to Thomas Cosworth for forty years from and after the expiration of the former lease, which term, by mesne assignment, became vested in Richard Gardiner: That 17th November, 5 Jac. 1, the same was demised to said Gardiner, for ninety years, determinable on three lives from and after the term then subsisting: That these terms were assigned to Samuel, father of William Pendarves: That on 15th September, 1631, William Pendarves purchased the fee-simple of the premises:— That on 4th December, 1635, Samuel Pendarves assigned the residue of his terms to Thomas, his second son, and on 12th December, 1638, William conveyed the inheritance to his father Samuel: That on 15th December, 1638, Samuel Pendarves (in consideration of natural love and affection) covenanted, that he and his heirs should stand seised (i), of the premises, to the use of himself for life, with remainder to his son Thomas for ninety-nine years, if he, or any wife he should marry, or any issue he might have, should so long live: That Samuel died in 1643, at which time the said term of ninety-nine years commenced: That Thomas granted several under-leases, for terms determinable upon lives: That in 1738, Henry, the only surviving issue of Thomas Pendarves, died; whereupon the reversion in fee (then vested in said John Pendarves Bassett,) took effect. It was agreed, that the rent reserved on the lease of 1742, was in proportionable share of the ancient rent (k): And upon the whole the question was, whether this be a good lease, under the power contained in the settlement of the 12th April, 1737?

**Thurlow*, for the plaintiff, took some slight objections to the want of usual covenants, and the non-execution of the power in the presence of two witnesses, which were not stated in the case; but, it appearing, that the principal question below was, whether the lands had been *usually so letten*, the Court over-ruled those exceptions. [•448]

As to the principal point, he argued, that the leases in 1533 and 1586, were both for terms absolute, and therefore not of the present kind. As to the lease in 1608, it is for ninety years, not ninety-nine, as in the present case. But, if good, still one instance will not create a custom of so letting, for *usus aequiparatur actibus*: 2 Roll. Abr. 262; Vaugh. 32; 2 Jones, 27. And besides, any rent reserved upon that lease will not be a rent reserved within twenty years preceding the year 1742. The covenant in 1638 is a transaction of another nature, a provision for a man's son in consideration of natural affection, not a lease to a tenant: and it could not be in the contemplation of the settler to square the manner of leasing, by a substantive provision for a younger branch of the family.

Burland, Serjeant, for the defendants, argued, that the power is, to lease for any number of years determinable, &c. There-

(i) *Stapleton's Ca.*, cited by *Hale*, C. J., 1 Vent. 228; *Hastings' Ca.*, cited T. Raym. 239. (k) See *Roe v. Rawlings*, 7 East, 279; *Doe v. Creed*, 4 M. & S. 371.

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fore lands, "usually so demised," must mean, "usually demised for any number of years." Ninety years was formerly the usual term for determinable leases. So is the case cited from Vaughan. The lands had been in lease for 200 years and upwards; and, if they are only twice demised, that will be interpreted usage.

Not to insist on the absolute leases, the determinable ones of 1608 and 1638 bring the usage down to the present time. A lease may be made by a covenant to stand seised, since the statute 27 Hen. 8: so laid down expressly, in Lord Bacon's Use of the Law. The present lease is more beneficial to the reversioner than that covenant; for there the lives were uncertain, and might have extended to more than three.

- [*449] *N. B.—Norton, Solicitor-General, for the plaintiff, and Blackstone, for the defendant, were retained for a second argument. But the Court (*absentibus* DENNISON and FOSTER), were clear upon the first.

And by Lord MANSFIELD, C. J.—This is a settlement made by Mr. Basset, the owner of the fee, in the usual manner, with a power to make leases, according to the custom of the country, where the usual profit arises from fines. There is also a very wise provision for leasing during the tenant's infancy. And the leases are to be for any number of years, determinable on one, two, or three lives. There is no doubt, but that the premises have been let for years so determinable ever since the reign of Queen Elizabeth. And the present lease was approved by the Master, the estate being in Chancery. A doubt is made, because the last preceding lease is, by way of covenant, to stand seised in a family settlement. I make no question but it is in all respects a lease. It is said, that this is not a lease to make a profit of, but is properly only a provision for a younger child. What then? The lessor's bounty to his child arises not from granting the lease, but from remitting the fine. It is a common case for bishops, deans, &c. and for tenants for life, with such powers as the present, to grant beneficial leases of such estates as chance to fall in, in trust for themselves or for their children. Are they the less leases upon that account? This power was intended as a benefit to the person in possession, and a benefit to the estate itself, which may be prejudiced sometimes by non-renewal. It appears to have been properly executed. And indeed powers, being derived from equity, ought to be liberally construed. I can't conceive how it ever came to be thought, that they should be construed strictly; being only a modification of the uses of an estate, by the absolute owner of it.

- [*450] WILMOT, J.—This case is the more unfavourable for the lessor of the plaintiff, because he is a mere volunteer, and is endeavouring to defeat the estate of a purchaser for valuable consideration. Had the elder brother pleased, he could at any time have defeated the estate of Francis, the younger brother. And yet Francis is now attempting to set aside an act done for

the benefit of his nephew, the son of that brother, from whose bounty he receives his own title.

Judgment for the defendants (1).

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(1) Co. Lit. 44 b; *Goodtitle v. Fencum*, 2 Doug. 565; *Pomery v. Partington*, 3 T. R. 665; *Doe v. Halcombe*, 7 T. R. 713; *Doe v. Rendle*, 3 M. & S. 99. See also the great case of *Doe d. Jersey v. Smith*, 5 M. & S. 467, in B. R.; *S. C.* 1 Brod. & B. 97, 7 Pr. 281, in Cam. Scacc.; *S. C.* 2 Brod. & B. 473, in Dom. Proc.

HILARY TERM,—4 GEO. III. 1764.—K. B.

JOSEPH YATES, of the Inner Temple, Esq., was this Term appointed a Justice of the Court of King's Bench, in the room of Sir Michael Foster, deceased, and received the honour of knighthood.

TALBOT v. LINFIELD.

S. C. 3 Burr. 1455.

ORDER for a month's time to plead. No plea being put in, the plaintiff, on the 29th day after, signed judgment. Motion to set aside the judgment as irregular, because the order shall be construed to extend to a calendar month, as most beneficial to the party. But by Lord MANSFIELD, C. J.—A month in law is always a lunar month, except in *quare impedit*. And by DENNISON, J.—In all temporal cases, we go by lunar months; in ecclesiastical cases, by solar (a).

A month's time to plead is a lunar month.

Rule discharged.

(a) The time is reckoned *inclusivè* of the first day, i. e. the day of the date of the order, but *exclusivè* of the last day, as in the present case; a lunar month consisting of twenty-eight days; *Kay v. Whitehead*, 2 H. Bla. 35; Tidd's Pr. 483 (ed. 1821), *acc.*; but see *Freeman v. Jackson*, 1 Bos. & P. 479, *semb. cont.* A month in law, in temporal matters, is always a lunar month of twenty-eight days; Co. Lit. 135 b; 2 Bla. Com. 141; *R. v. Adderley*, 2 Doug. 463; *Lacon v. Hooper*, 6 T. R. 224. In commercial matters, however, it is generally intended a calendar month, as in bills of exchange, promissory notes, insurances, and the like; *Titus v. Preston*, 1 Stra. 652; *Cockell v. Gray*, 3 Brod. & B. 186; *S. C.* 6 B. Mo. 483; Bayley on Bills, 113 (ed. 1811). It also may mean a lunar or calendar month, according to the intention of contracting parties; *per Le Blanc, J.* "it is very true that in matters temporal the term month is understood to mean lunar month, whilst in matters ecclesiasti-

cal it is deemed calendar, because in each of those matters a different mode of computation respectively prevails; the term therefore is taken in that sense, which is conformable to the subject-matter, to which it is applied;" *Lang v. Gale*, 1 M. & S. 111. In *quare impedit*, in cases of lapse, it has been decided to mean a calendar month; *Catesby's Ca.*, 6 Rep. 61 b; but from the other reports of that case, Cro. Jac. 141, 166, Yelv. 100, it seems only to have been decided, that *tempus semestre*, within which the patron must present, means half a year, there said to be 182 days, (which however does not always correspond with the number of days comprised in six calendar months), and not six months of twenty-eight days each, which would amount to 168 days only. And *Ld. Kenyon*, in *Lacon v. Hooper*, (*supra*), says: "In the instance indeed of *quare impedit* the computation of time is by calendar months; but that depends on the words of an act of Parliament, *tempus semestre*." So, in the proof of a suggestion

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in prohibition, by six months is to be intended *dimidium anni*, and not six lunar months; Litt. R. 19; and in *Copley v. Collins*, Hob. 179, it is said, that they shall be counted according to the calendar; 2 Roll. Abr. *Temps.* (C) pl. 2, *S. C.* See

also Com. Dig. *Ann.* (B); *Doe dem. Deggett v. Snowden*, post, 1224. By *solar*, *Dennison, J.*, must be understood to mean *calendar* months, and so is the report in Burrow: a *solar* month is the twelfth part of 365 days, viz. 30 days and 10 hours.

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MILLER's Case.

No proceedings can be pursued under a repealed act of Parliament, though begun before the repeal; unless by special exception.

UNDER the Insolvent Debtor's Act, 1 Geo. 3, one Miller was compelled by a creditor, at the Sessions at Guildhall, to give up his effects, and he accordingly signed and swore to his schedule, &c. But some circumstances arising, the Court adjourned his discharge till the next Sessions. In the mean time, the statute 2 Geo. 3, passed, which repealed the compelling clause. Motion for a *mandamus* to the justices, now to proceed to grant Miller his discharge, the jurisdiction having attached before the clause was repealed. But by the Court:—Nothing is more clear, than that the jurisdiction is now gone, and that we cannot grant any such *mandamus*. Even offences committed against the clause (while in force) could not have been now punished, without a special clause to allow it; and therefore, a clause is inserted in the repealing statute for that purpose (b).

Rule discharged.

(b) A contract declared by a statute to be illegal, is not made good by a subsequent repeal of the statute; *Jaques v.*

Withy, 1 H. Bla. 67; and see Com. Dig. *Parliament* (R 10, &c.)

HARRIS, an Executor, v. JONES.

S. C. 3 Burr. 1451.

Executors in some cases shall pay costs for leave to discontinue.

ASHHURST moved for leave to discontinue without payment of costs, the plaintiff being an executor.

Walker shewed for cause, that the action was brought by one executor in his own name only, when he knew that there were others subsisting; and that thereby he had wantonly put the defendant to great expence.

And by DENNISON, WILMOT, and YATES, Js. (*absente* Lord MANSFIELD, C. J.) This is a matter within his own knowledge. The plaintiff comes to the Court for a favour; and we will therefore put what terms we please upon him. There are many cases, where executors, applying for favours, are obliged to pay costs (c).

Rule absolute, on payment of costs.

(c) *Hale* (Administrator) v. *Norton*, Barnes, 169, Cas. Pr. C. P. 79; *Meluish v. Maunders*, 2 N. R. 73, ecc. But an executor or administrator will be allowed to discontinue without payment of costs, where he has not knowingly brought

a wrong action; *Baynham v. Mathews*, 2 Stra. 871; *Bonnet* (Administrator) v. *Coker*, 4 Burr. 1927. In general, when plaintiff, he shall pay no costs; however, this must be understood to be, when he is under a necessity of naming himself exe-

cutor or administrator, for if he were under no such necessity, he shall pay costs; Bull. N. P. 331. "It is clear upon the statute, where an executor or administrator necessarily sues as such, he is not liable to costs. And yet it has been holden, that where he is guilty of misbehaviour he shall pay costs. As where he suffers himself to be non-prosecuted; where he has knowingly brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs upon a discontinuance; or for not proceeding to trial according to notice:"

Per Rooks, J., in *Comber v. Hardcastle*, 3 Bos. & P. 117. See also n. (q), *ante*, 356. In the case of an executor or administrator, wrongfully suing as such upon a contract made with his testator, and not succeeding, the Court will, in their discretion, make an order upon him to pay costs to the defendant; but costs cannot be awarded on the record, and judgment must be entered without them; otherwise it would be erroneous, *Ibid.*; *Barnard v. Higdon*, 3 B. & A. 213. As to discontinuance, see *Roe v. Gray*, *post*, 815.

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THE KING v. BANKES and Others.

S. C. *Ante*, 445.

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THE name of John Price, the mayor *de facto*, being now inserted in the rule, the principal question came on to be argued; when it appeared, that Mr. Bankes was lord of the manor of Corfe Castle, and Mr. Henry Bankes (his brother) was steward or bailiff of the manor, who had appointed a deputy-bailiff, who usually held the courts in his stead; and had warned a jury for a court on the 25th October, 1763, when a mayor was to be elected for the year ensuing. But he, suspecting that the deputy-bailiff had been tampered with to warn a jury, who would chuse a mayor in the interest, not of the lord of the manor, but of Mr. Calcraft his opponent, suddenly revoked his deputation after the jury were warned; so that no court was held, and of consequence no mayor chosen on the regular prescriptive day. And now the motion was for a *mandamus* to the lord of the manor to hold a court leet, and to the jurors by name, who were summoned for the 25th of October, to appear and form a jury, in order to proceed to the election of a mayor: It being argued that Price's election, being not on the prescriptive day, was invalid.

Mandamus to summon specific jurors upon a Court Leet, denied.

But by the whole Court.—We are all of opinion, that a special *mandamus*, to the jury [by name] (d), is new and unprecedented; and cannot be granted. Nor, upon this rule, can any general *mandamus* issue; more especially, as there is already a mayor *de facto* subsisting (e). So discharge the rule; but, as the steward has behaved illegally, in the revocation of the deputy-bailiff's power, after the jury were summoned, no costs shall be allowed.

(d) This evidently should be so; and not "to the same jury" as in the former edition.

(e) It appears from the report in 3 Burr. 1454, that if it was a doubtful election, and fit to be tried upon an information in nature of a *quo warranto*, the Court ought

not to grant a *mandamus*; but if it was a mere colourable election and clearly void, they ought. See also *R. v. Mayor of Tintagel*, 2 Stra. 1003; *Scarborough Corporation*, 1d. 1180; *R. v. Mayor of Cambridge*, 4 Burr. 2008, and *R. v. Lord Montacute*, *ante*, 60, and notes.

THE KING v. WINTERBORNE.

S. C. Burr. Sett. Ca. 520.

Serving constable as substitute for another, is not serving an office so as to gain a settlement.

ON a *certiorari* it appeared, that William Merrick and his eight children were removed, by an order of two justices, from Winterborne to St. Philip and Jacob in Gloucestershire. On appeal to the Sessions, they discharge this order, *and state, that the pauper, about thirteen years ago, gained a settlement in St. Philip and Jacob: That, at a Court Leet at Winterborne, the 3d of October, 1761, one Richard Bailey was chosen constable for the tithing of Hambrook in Winterborne, but was never sworn in, nor took on him the said office; but procured the pauper to serve the said office in his stead, in order to gain the pauper a settlement at Winterborne: That the pauper was accordingly sworn in before a justice, and served for the year, and lived in Hambrook; but was never presented at the leet, though the custom has ever been, that all constables should be first presented there.

Morton and *Vernon* argued, that the pauper was settled at Winterborne; that he served the office on his own account, as a *substitute*, not as a *deputy*, and was the real officer of the tithing.

But the Court, without hearing any counsel on the other side, were clear, that this was not serving an office on his own account within the intent of the statute; and discharged the order of Sessions and confirmed the order of the justices (g).

(g) So executing the office of tithing-man, as deputy, will not gain a settlement, even though he be sworn at the Court Leet; *R. v. Allcannings*, Burr. Sett. Ca. 634. A pauper gains a settlement in that parish, in which he resides, by executing the office of constable for a *clity*, which consists of several other parishes; *R. v. St. Maurice*, Burr. Sett. Ca. 27; 2 Stra. 1014, *S. C. Lee, J.*, there said (p. 34), that under 9 & 10 W. 3, c. 11, if he exe-

cute such an office by deputy he gains a settlement. And so it was decided in *R. v. Hope Mansell*, Cald. 252. But where a boroughholder, regularly sworn in at a Court Leet, after executing his office a few days was irregularly discharged by two magistrates, in which he acquiesced, and did not in fact afterwards execute the office, he did not gain a settlement; *R. v. Holy Cross, Westgate*, 4 B. & A. 619.

FRENCH v. CORNELYS.

In judgments by default the plaintiff is to make up the whole record; but if error is brought for a slip in not making proper entries for the defendant, judgment shall stay till he can apply to amend below.

ERROR from the Common Pleas of a judgment by default on a note of hand. The error assigned was, that no warrant of attorney for the defendant (the now plaintiff in error) was entered on the record below (h).

Ashhurst, for the defendant in error (the plaintiff below), insisted, that a man shall not take advantage of his own neglect in not making proper entries on record.

Clayton, contra, that, in judgments by default, the plaintiff is to make up the whole record, and therefore it is his own laches.

(A) See *Richards q. t. v. Brown*, 1 Doug. 114 a, and notes; Com. Dig. *Amendment* (E); Tidd's Pr. 110, 587 (ed. 1821).

The Court ordered the cause to stand over, till the Court of Common Pleas could be moved, for leave to amend the record. And afterwards, on an application to the Chief Justice of the Common Pleas at his chambers, he directed a proper *warrant of attorney to be filed and entered; and thereupon a new *certiorari* issued, and the judgment was affirmed in the King's Bench (i).

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(i) On error from C. P. to K. B., the amendment may be made either in the Court above or the Court below; *Blackmore's Ca.*, 8 Rep. 156 a, 163 a; *Wood v. Matthews*, Poph. 103; *Friend v. Duke of*

Richmond, Hardr. 505; *Hardy q. t. v. Cathcart*, 1 Marsh. 180; *Dunbar v. Hitchcock*, Id. 382, 5 Taunt. 820, 3 M. & S. 591, 3 C. C.; *Com. Dig. Amendment* (3 A, 2 B).

KENDRICK v. KYNASTON.

IN assault, the latitat was of Michaelmas Term, but the defendant never appeared; and this Term the plaintiff entered an appearance for the defendant, and filed common bail and left a declaration in the office. And now, before plea pleaded, or imparlance prayed, *Blackstone* exhibited a claim of consuance (k), by the Earl of Litchfield, Chancellor of the University of Oxford; stating the charters of the University, confirmed by statute 13 Eliz. (l); and alleging, that the defendant was a privileged person, as being a matriculated person, and fellow of Brazen-Nose College, where he was a master of arts and in holy orders. This claim was under seal of the Chancellor's office, and was (previous to the present motion) entered upon record, together with a letter of attorney from the Chancellor, empowering one Elderton, an attorney of this Court, to appear in his name, and demand the consuance (m). There

Claim of consuance by the Chancellor of Oxford, how made.

(k) See the form of a claim of consuance by the Chancellor of the University of Oxford, in *Welles v. Truherne*, Willes, 233, n. (a). During the vacancy of the office of Chancellor it may be made by the Vice-Chancellor; *Williams v. Brickenden*, 11 East, 543. A claim on behalf of the University of Cambridge is made by the Vice-Chancellor, as *locum tenens* or deputy of the Chancellor, and of the masters and scholars. See the form in *Browne v. Renouard*, 13 East, 12. As to consuance by the Universities, and the time and manner of claiming it, see the above cases, and *Wilkins v. Shalcraft*, Hardr. 188; *Castle v. Lichfield*, Hardr. 505; *Parker v. Edwards*, 1 Show. 352; *Woodcock v. Brooks*, Ca. temp. Hardw. 241; *Leasingby v. Smith*, 2 Wils. 406, where the time of claiming consuance is particularly considered, (Oxford): *Case of Cambridge University*, 10 Mod. 126; *R. v. Agar*, 5 Burr. 2823, (Cambridge); Vin. Abr. *Consuance*; *Com. Dig. Courts* (P 2, 3).

(l) C. 39: see 4 Inst. 227.

(m) It is to be observed, that the Uni-

versity of Oxford has consuance of all manner of trespasses and other offences whatsoever, and of all other contracts, pleas, and complaints personal (assizes and pleas of freehold alone excepted) arising, done, or committed within the town of Oxford, &c., or elsewhere within the kingdom of England, where the scholars or their servants, or ministers, or any other persons, who ought to have any privilege of the said University, whom the Chancellor, &c. shall challenge, is one of the parties. But the University of Cambridge has consuance of all personal pleas, and of all misdemeanors within the town of Cambridge and its suburbs (mayhem and felony only excepted), where any master and scholar or servitor, or common minister of the said University, shall be one of the parties. Therefore in case of a claim by the latter University, it must appear by affidavit, that the cause of action, if any, arises within the liberty of the University, to wit, within the town and suburbs of the town of Cambridge.

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were also affidavits from the defendant himself and another person, which proved him to be, at the time of the writ sued, and at the time of making the claim, a matriculated person (n). On reading all which, and also the charter of King Henry the Eighth under the great seal, and an exemplification of the statute 13 Eliz. (which, though printed in the statute books, is only a private act) the Court granted a rule to shew cause, why the cognizance should not be allowed; and, in the mean time, all proceedings to stay (o).

(n) It should also appear by affidavit, that the party is actually resident within the University; the privilege not extending to non-resident members; *Hayes v. Long*, 2 Wils. 310; *Browne v. Renouard*, 19 East, 12. But where an affidavit described the party to be of the parish of —, in the suburbs of the city of Oxford; and marshal of the University of Oxford: and that he had been for fourteen years, and then was a common servant of the University, and called marshal of the University; it was held sufficient, though he was not expressly stated to have been resident; *Thornton v. Ford*, 15 East, 634: see also

R. v. Routledge, 2 Doug. 581.

(o) "The entry of the claim on the roll in the case of *Kendrick v. Kynaston*, in B. R. was exactly like that in *Hayes v. Long*, 2 Wils. 310, (which seems to be drawn from it). I was in that Court, when a rule to shew cause was made, why the claim of consuance should not be allowed; but nothing further was done, nor was the rule ever made absolute; so that whether the claim in the case of *Kendrick v. Kynaston* was duly made and entered or not, was never determined;" *Per Wilmut, C. J.*, in *Leasingby v. Smith*, 2 Wils. 409.

BOND v. SEAWELL.

S. C. Ante, 407, 422.

[If three witnesses attest the last sheet of a will, and the other sheets are
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then in the same room, though they do not see them, or know that they are so, it is a good attestation.]

THIS case was again argued by *Willes* for the plaintiff; who observed, that if a testator had shewn a will made on several pieces of parchment rolled up, so that only the bottom should appear to the witnesses, that would doubtless be a good attestation. That the inconvenience suggested, that the testator might substitute another sheet never seen by any witness, would be equally strong, if all the witnesses had seen it; for it was all written with his own hand, and he might change any part of it at pleasure. That the *dictum* relied on (in *Lea and Libb*, 3 Mod.) supposes, that none of the witnesses see the first sheet, which is not the present case. He also cited *Wyndham and Chetwynd*, 31 Geo. 2(p), from 2 Burn's *Ecclesiastical Law*, but was interrupted by Lord *Mansfield*, who said that book was no authority, and that the case cited was ill reported to his knowledge.

Norton, Attorney-General, for the defendant, allowed, that this instrument might be good as a will, but not as a devise of lands. That the word *will* is never once mentioned in stat. Car. 2. The only question is, whether it has all the statutable requisites to such a devise. We say, it is not statutably attested. It is rather a question of fact than of law. I admit, that the witness need not know the number of sheets which he attests: but here he actually did know it. When he positively says, "I attested a will of one sheet only," and you produce a will of two sheets; the Court will say, "That is not the same

(p) *Ante*, 95.

instrument." There is no room for presumptions here: To establish this as a good attestation, would, in point of precedent, be a great inlet to fraud. If a testator be allowed to add a sheet not seen by the witnesses any other bad man may.

Curia advisare vult (q).

(q) But it appears from 3 Burr. 1776, that a new trial was ordered. *Ld. Mansfield, C. J.*—"Every presumption ought to be made by a jury in favour of such a will, when there is no doubt of the testator's intention. It is not necessary, that the witnesses should attest in the presence of each other; or that the testator should declare the instrument he executed 'to be his will;' or that the witnesses should attest every page, folio or sheet; or that they

should know the contents; or that each folio, page or sheet, should be particularly shewn to them. This has been settled.—We are all of opinion, that it ought to be tried over again. And if the jury shall be of opinion, that the first sheet of the will was then in the room, they ought to find for the will generally; and they ought to presume from the circumstances proved, that the will [i. e. the *entire* will] was in the room."

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OVER-NORTON v. SALFORD.

S. C. Ante, 433.

LORD MANSFIELD, C. J., delivered the opinion of the Court very briefly; that Peter White the father gained no settlement at Salford by his purchase, except during his inhabitancy there; which would have been the case, if this act, 9 Geo. 1, c. 7, had been never made; for during such inhabitancy he could not have been removed from his own. The father is irremovable from Salford, according to the doctrine in *Wookey* and *Hinton*, Stra. 476, but he gains no permanent settlement there; he therefore can convey nothing to the son, but his settlement at Over-Norton. What weighs with us *greatly, is the inconvenience that must arise from the contrary opinion. If the pauper had gone to a third parish, and become chargeable; whither should he be removed? Certainly not to Salford; because then the order must have been finally conclusive and binding upon Salford, for ever (r).

Order of Sessions discharged.

The son of a man who purchases under 30l. consideration, born during his father's residence on such purchase, is settled at his father's prior settlement, though the father still [* 456] continues to reside on the purchased estate.

(r) As to emancipation and derivative settlements, see *R. v. Walpole, St. Peter's*, post, 669.

The KING v. Sir EDWARD SIMPSON.

S. C. 3 Burr. 1463.

MOTION for a *mandamus* to the Judge of the Prerogative Court, to permit Edmund Brown, one of the executors named in the will of Sarah Elizabeth Angelica Latour, to retract his renunciation of the said executorship, and to grant a probate of the said will to the said Brown and Ann Layton the other surviving executrix.

On behalf of the *mandamus* it was suggested, that Layton was become insolvent, and that the effects (which were very considerable) were in danger of being dissipated in her hands,

[*Semble*, that] an executor, who has formally renounced, can afterwards retract such his renunciation at pleasure, before probate granted to his co-executor.

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to the prejudice of the residuary legatees, who were distinct from either of the executors.

Dr. Collier shewed for cause, that Brown had twice renounced on oath before a surrogate, and that, by the practice and law of the Ecclesiastical Courts, no retraction could be admitted of a renunciation upon oath: and cited Decretal. 2, 3, 4; Decretal. 2, 7, 1, 8; Lyndewode tit. *de Præsumption*, ca. *ne lepra. v. renunciants*; that the executor has a year to deliberate, but, having once renounced, he cannot return. *Broker and Charter*, Cro. Eliz. 92; the executors sent a letter to the judge of the Prerogative, desiring him to grant administration to the next of kin. The question was, if they could come in afterwards and retract? The Court held, that such refusal was binding to all the executors. The words of the oath of renunciation are, "that you have not, and will not intermeddle, in the effects, &c. and do renounce all right, &c." The question therefore is, whether Brown shall be admitted to perjure himself. He allow^d, that in some cases, for good considerations, the renunciation might be retracted: but here is none such. This suggestion of insolvency was never made in the Spiritual Court, and Layton by the will is entitled to a legacy of 1200*l.*; and Brown, we say, is as poor as Layton.

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Lee, on the same side, argued, that in *Hensloe's Case*, 9 Co. 37, it is held, that the spiritual judge may take a renunciation from all the executors, but not from one only: and Hardr. 111, is to the same effect. Therefore by granting the probate to Layton only, Brown would be made also an executor;—the consequence of which is, that the *mandamus* would be nugatory, and of course the Court will not grant it.

Norton, Attorney-General, in support of the rule, insisted, that an executor, who has renounced, has a right to be considered as an executor, whenever he thinks proper; provided probate has not been granted, as in the present case it has not. That the common law, not the canon, must be the rule. The testamentary jurisdiction of the spiritual Courts (which originally belonged to the temporal Courts, and is retained by some to this day) arose from the statute of administrations, in the reign of Edw. 3 (*s*). Their power of calling in and swearing executors is an usurped jurisdiction, and ought not to be endured, much less favoured, in the temporal Courts. If there be twenty executors, and one proves the will, the other nineteen are by common law executors also; and the Ecclesiastical Court has no business to call them in to prove or to renounce.

It has been held, Dyer 160 b, that an executor, though he renounces, is, by the probate granted to any other of the executors, himself become executor to all intents and purposes. Actions must be brought in the name of all, though one only proves the will. And that renunciations are not peremptory but may be retracted, appears from *Robinson and Pett*, in Chancery, 1734, P. Wms. (*t*), and *House* and Lord *Petre*, Salk.

(s) 31 E. 3, st. 1, c. 11.—See 1 Show. Vin. Abr. *Prerogatives* (M c).
407; *Offley v. Best*, 1 Lev. 186; Plowd. 277; (t) 3 P. Wms. 251.

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311 (v). If the ecclesiastical oath is contrary to this, it is an illegal oath, and ought not to be administered. However it seems, that, *upon good cause*, the Court below can absolve from the oath, as well as administer it. The case in Cro. Eliz. is, *where all the executors renounced; and then the man is *quasi* intestate, and administration must be granted under the statute, which I allow cannot be revoked. If the Judge has any doubt, he may make a return, and the ground of his doubt will be examined: for this is not a peremptory *mandamus*. But let him not endeavour to encroach by assuming a jurisdiction to reject a legal executor. I remember another step towards encroachment, where the Spiritual Courts refused to grant probate to an insolvent executor, unless he gave them security. But this Court held, that the Ecclesiastical Judge had nothing to do with security. The testator was to judge of the fitness or unfitness of his executor.

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LORD MANSFIELD, C. J.—The consequence was, that the Court of Chancery was forced to assume a new jurisdiction, and take the power out of the executor's hands, and appoint a receiver of the effects (u).

So they must be obliged to do, should the Court refuse the present motion. Equity would compel the woman to give security.

LORD MANSFIELD.—Is there any case, where the Ecclesiastical Court has granted, or this Court has compelled them to grant a new probate to an executor, who has [formally] (w) renounced?

None; but here we come before any probate granted. Had probate been granted, without a reservation for the others to come in (which in common cases is the usual course) we might have been too late. Many advantages are gained by having the probate in one's own name; so that the *mandamus* will not be nugatory.

LORD MANSFIELD, C. J.—The two executors swear, that each reciprocally is insolvent. They are both merely trustees, I should be glad to hear counsel for the *cestuy que trust*, who is principally concerned in interest. If they mean honestly, they should both renounce, and let administration be granted to a third person named by the *cestuy que trust*.

*The rule was enlarged to the last day of Term, and notice ordered to be given to the *cestuy que trust*. But, in the mean time, difficulties arising to prevent the mutual renunciation, it was agreed, that probate should be granted to both; they entering into a rule to give proper securities and indemnifications to the *cestuy que trust* and each other.

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(v) And see also *Mead v. Lord Orrery*, 3 Atk. 239, and *Henslow's Ca.*, cited in the text. From all which it appears, that the renunciation is not peremptory; that such as refuse may afterwards come in and administer; and that, although they never acted during the lives of their co-executors, they may assume the execution of the will

after their death, and shall be preferred before any executor appointed by them; Bac. Abr. *Executors* (E 9); Toller's Ex. [45].

(u) *R. v. Sir Richard Rains, Carth.* 457; see also *Hills v. Mills*, Salk. 36.

(w) In the former edition this passage is, "who has formerly renounced."

THE KING v. FARREL.

If a stroke be given at sea, and the party die in Ireland, *Qu.* Where shall the murder be tried?

THE defendant was bound by recognizance to appear in this Court to answer to a charge of murder, by giving a mortal stroke to one Nunn, upon the high seas, of which he afterwards died (as was alleged) at Cork in Ireland. On the other hand, the defendant produced affidavits, that the blow was accidental, occasioned by pulling the deceased out of his hammock, to make him return to company, which he had just retired from; and that the cause of his death was a distemper contracted at the Havannah. He therefore appeared on his recognizance, and moved to have it discharged, which was warmly opposed by the prosecutors. This occasioned some difficulty, how to dispose of him, where he was to be indicted, and how he was to take his trial. And upon Lord *Mansfield's* enquiring, whether the statute 2 Ed. 6(x), was re-enacted in Ireland, it was answered at the bar, that they had a statute in 10 Car. 1, to the same effect. At length the Court continued his recognizance till the next Term; with an intimation, that if the defendant appeared at the first day of the Assizes for the county of Cork in Ireland, then, on affidavit made thereof, the recognizance should be discharged without his farther personal appearance. But the Court added, "Let no man take occasion, from this order, to say in Ireland, that this Court has given any opinion, whether the offence is or is not there triable."

On the first day of the next Term, on affidavit of the defendant's appearance at the Assizes, the recognizance was discharged.

(x) 2 & 3 Ed. 6, c. 24, which relates only to the case of a party stricken in one county and dying in another; then the offender shall be tried in the latter: and therefore has no analogy to the present case, where the party was stricken on the high seas. By 2 G. 2, c. 21, where a

person stricken upon the sea shall die thereof in England, or *vices versa*, the offender shall be tried in that county in England, where the death or stroke happened. But that statute only extends to persons dying or stricken in *England*.

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EASTER TERM,—4 GEO. III. 1764.—K. B.

THE KING v. WEBB.

S. C. 3 Burr. 1468.

Terms imposed on prosecutor, before allowed to quash his own indictment.

THE defendant was indicted the 15th of January, 1764, at Hicks's Hall, for perjury in his evidence on a trial in the Court of Common Pleas, between *Wilkes* and *Wood* in Michaelmas Term: which indictment was removed by *certiorari* into the King's Bench, at the instance of the prosecutor. The defendant appeared and pleaded not guilty, and notice of trial was

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given for the first Sittings after Hilary Term, but countermanded by the prosecutor on February the 11th. Whereupon the defendant gave notice of trial by proviso for the first Sittings in the present Term. And on the 3d of May, a few days before the Term, a fresh indictment was preferred and found against the defendant, and also removed by *certiorari*. Upon which, on the first day of this Term, *Glynn*, Serjeant, moved, on behalf of the prosecutors, to quash the first indictment. But it was opposed by *Blackstone* for the defendant, unless the counsel would name the prosecutor, and put the defendant, who was desirous of a speedy trial to clear his innocence, in the same plight as he stood in upon the former indictment; as there might otherwise be room for collusion on the one hand, or vexation and oppression on the other, if any counsel might move to quash an indictment, as on the part of the prosecutor, without naming him, if called upon. The motion was adjourned till the next morning, and was then supported by *Glynn*, Serjeant, *Eyre*, Recorder of London, *Stowe*, *Dunning*, and *Wallace*; and controverted by *Norton*, Attorney-General, *Morton*, and *Blackstone*. And for the prosecutor it was alleged, that the first indictment was bad, the perjury being assigned improperly, in not shewing that the evidence given was in a matter sufficiently relevant to the issue (a); and that by the rule and practice of the Court, a prosecutor had a right, by his counsel, to quash his own indictment without disclosing his name. And they cited the *King* against *Swan* and *Jefferies*, Foster, 105, and *Withypool's* Case, Cro. Car. 147. For the defendant it was insisted, that where there was so palpable a delay on the part of the prosecution, the Court would not indulge them in quashing the first indictment, without laying them under terms; and particularly, those of a speedy trial and of naming the real prosecutor. *K. and Moore*, Stra. 946.

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And by Lord MANSFIELD, C. J., and the whole Court.—There can be no such rule, that, when a man is indicted for an infamous offence, the prosecutor is entitled to come into Court, and quash his indictment as often as he pleases; it may be *in infinitum*. The Court will see, that no mischief or oppression ensues, before they grant leave for that purpose. Therefore, let the first indictment be quashed (b), the counsel

(a) See *R. v. Grieps*, 1 Lord Raym. 256; *R. v. Aylett*, 1 T. R. 69, per Lord Mansfield; *R. v. Dowlin*, 5 T. R. 318.

(b) The Court may quash an indictment, at their discretion, for an insufficiency, which would make the judgment erroneous; but they are not bound to do so *ex debito justitiæ*, but may oblige the defendant to plead or demur to it; 2 Hawk. P. C. c. 25, s. 148; and see *R. v. Johnson*, 1 Wils. 325; *R. v. Wheatley*, ante, 275, 2 Burr. 1127. S. C. In general, a motion to quash an indictment should be made before plea pleaded; *Frith's* Ca., 1 Leach. 11 (ed. 1815). And the Court will not quash a defective indictment on the motion of the prosecutor after plea

pleaded, before another good indictment is found; but it seems the consent of the defendant is not necessary for quashing an indictment, even after plea pleaded; *R. v. Dr. Wynn*, 2 East, 226. If a second indictment be found, pending the first, the Court will not quash the first, unless the expenses incurred by the defendant, upon the first, be paid to him; 1 Stark. Crim. Plead. 282. The Court will not give leave to quash an information filed by the Attorney-General *ex officio*; but he may stop the proceedings by *noli prosequi*, and file another; *R. v. Stratton*, 1 Doug. 239.—See Com. Dig. Indictment (H); 3 Bac. Abr. Indictment (K); and 1 Stark. Crim. Plead. c. 17, p. 281.

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for the prosecution consenting that the second shall stand to all intents and purposes in the same plight and condition as the first would have done; and, after such evident delays, the counsel must be called upon to name the prosecutor.

Serjeant *Glynn* then named John Wilkes, Esq. as the prosecutor: who, having absconded from justice at the times when both the indictments were preferred, the Court demanded, by what authority he made that declaration: to which the Serjeant answered, by the instructions of James Philips, the solicitor in this prosecution.

N. B.—The defendant, at the Sittings in the same Term, was afterwards tried and acquitted, by a special jury of the county of Middlesex.

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FULKE v. BOURKE.

S. C. Cited in 4 Burr. 2107.

In order to exonerate a bail excepted to, his name must be struck out of the bail-piece.

ASHHURST moved to stay proceedings on a *scire facias* against the bail, for irregularity. The fact was, that Cook and Manning became bail for the defendant at a Judge's chambers, the cause being removed by *habeas corpus*. Afterwards, the bail being excepted to, Cook and one Saunders justified in Court. But Manning did not justify; yet his name was never struck out of the bail-piece. Whereupon, a *scire facias* issued against him. Barnes [104], *Lafortune* [and *Wilson*], was cited in support of the objection.

By the Court.—It should have been part of the rule, that Manning's name should be struck out of the bail-piece. And, on motion, it was accordingly so amended, without costs. And being so drawn up, no cause was afterwards shewn; and the rule was made absolute upon payment of the plaintiff's costs hitherto incurred (c).

(c) S. P. *Humphry v. Letts*, 4 Burr. 2107; *Gould v. Holstrom*, 5 East, 580. But though bail be excepted to, unless

piece, they still remain liable; *Waller v. Green*, Say. 308; *Bramwell v. Farmer*, 1 Taunt. 427. And see *Jones v. Tub*, 1 Wils. 337, Say. 58, as to bail in error.

COX *qui tam* v. MUNDY.

Omission of trespass, and inserting only the plea of debt in a bill of Middlesex by a common informer, amendable.

ASHHURST moved to stay proceedings on the bill of Middlesex, which was in debt only (and not in trespass with an *ac etiam* in debt), for a penalty incurred by having foreign lace in her house, being by trade a mantua-maker.

LORD MANSFIELD, C. J., refused a rule to shew cause, unless they would produce a precedent of a like rule within fifty years past; *absente* DENNISON, J. But the next day it was moved again, when DENNISON was present; it being alleged, that no precedent could be found of a bill of Middlesex in debt only: and then a rule to shew cause was granted. Afterwards, *Morton* shewed cause; that the statute 22 Geo. 2, [c. 34],

which inflicts the penalty, directs the penalty to be sued for in any of the King's Courts at Westminster, or in the Exchequer in Scotland; which gives this Court a jurisdiction, allowing it had none before, to hold plea in this action of debt.

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*Lord MANSFIELD, C. J.—It certainly creates a new jurisdiction in the Court of Exchequer in Scotland, which has originally no civil jurisdiction. But to shorten this debate, let the bill be amended by inserting the plea of trespass, and discharge the present rule. WILMOT, YATES, Js., *accord.*, DENNISON, J., *absent.* (d).

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(d) The Court refused to set aside a bill of Middlesex, which was "to answer in a plea of *debt*," instead of *trespass*, "and also to a bill to be exhibited in a plea of trespass upon the case;" *Barber v. Lloyd*, 2 T. R. 513. Amendments at common law, that is, while the proceedings are in paper, are allowed in penal actions; *Bonfield q. t. v. Milner*, 3 Burr. 1098; *Mace q. t. v. Lovett*, 5 Burr. 2833, where Lord Mansfield said, that there is no distinction between *qui tam* actions and civil actions, where an amendment at common law is applied for: *Cross v. Kaye*, 6 T. R. 543; *Maddock q. t. v. Hammet*, 7 T. R. 55; *Petre v. Craft*, 4 East, 433; *Dover v. Messaer*, *Id.* 435; *Messaer q. t. v. Hertz*, 3 M.

& S. 450, *acc.* But it is in the Court's discretion to allow such amendments, which they will not do, where the plaintiff has been guilty of unnecessary delay; *Goff q. t. v. Popplewell*, 2 T. R. 707; *Steel q. t. v. Saperby*, 6 T. R. 171; *Ranking q. t. v. Marsh*, 8 T. R. 30; nor, as to the parties to the suit, after a demurrer; *per Buller, J.*, 4 T. R. 228. It seems, that when the proceedings are entered on record, no amendments are allowed in such actions under the statutes of amendments: this may be inferred from the preceding cases, and from *R. v. Tuchia*, 1 Salk. 51; *R. v. Stedman*, 3 Ld. Raym. 1307; Gilb. C. P. 116. See also *Woodroffe q. t. v. Williams*, 1 Marsh. 419, 6 Taunt. 19.

SOULSBY v. HODGSON.

S. C. 3 Burr. 1474.

BOND conditioned to perform the award of two arbitrators, and, in case of their non-agreement, the umpirage of a third person as umpire (e). All three join in one instrument purporting to be an umpirage. *Wallace* argued it to be bad, on the authority of 1 Bulstr. 184. *Wedderburne contra.* And *per Cur.*—The case in Bulstrode is absurd. The joining of the arbitrators is surplusage, and does not vitiate the act of the umpire (f).

If arbitrators join with an umpire in his deed of umpirage, it is only surplusage, and stands good.

Judgment for the plaintiff.

(e) Where an umpire is appointed by the parties themselves, he may make his umpirage before the expiration of the time for making the award, if the arbitrators disagree; *Smiles v. Wright*, 3 M. & S. 559. As to the appointment of an umpire by arbitrators, see *Wood v. Doe*, 2 T. R. 644; *Oloer v. Collings*, 11 East, 367;

Harding v. Watts, 15 East, 556; *Noale v. Ledger*, 16 East, 51; *Routledge v. Thornton*, 4 Taunt. 704; 2 Wms. Saund. 133, n. (7); Vin. Abr. *Arbitrement*, (F); Com. Dig. *Id.* (F).

(f) S. P. *Beck v. Sargent*, 4 Taunt. 332: As to awards, see *post*, 475, 990, 1117.

THE KING v. OPENSHAW.

S. C. Burr. Sett. Ca. 522.

A TENANT at rack-rent was assessed to the poor's rate, and paid it; but, by a private agreement between him and his

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the tenant will
gain a settle-
ment, notwith-
standing the
landlord has
privately agreed
to pay them.

landlord, the landlord was to pay the rate; and accordingly, when the tenant paid it, he told the overseers to observe, that he paid it for his landlord. This was adjudged by two justices not to be a sufficient rating and payment of taxes to found a settlement upon, and of the same opinion was the Sessions.

But by Lord MANSFIELD, C. J.—Pray, whom was the landlord to pay it for? Clearly, for the tenant: for it is a tenant's tax. The Court has nothing to do with their private agreement. And *per tot. Cur.*—The settlement is clearly good (*g*).

The orders were discharged.

(*g*) *R. v. Bramley*, Burr. Sett. Ca. 75; *R. v. Chidingfold*, Id. 415; *R. v. Fulham*, Id. 488, *acc.* But by 35 G. 3, c. 101, s. 4, it is provided that, "after June 22d, 1795, no person shall gain a settlement by being rated, &c. for any tenement not being of the yearly value of 10*l.*"; which statute confines this mode of gaining a settlement within narrow bounds; as the occupation of a tenement of the yearly value of 10*l.* equally confers a settlement: though it

may be a question whether the operation of 59 G. 3, c. 50, (which see, *post*, 603), may not be the cause of settlements being again acquired by rating. Since the passing of 35 G. 3, it has been decided, that a custom-house officer, rated to the land-tax for his salary of 50*l.* *per ann.*, which rate was repaid him by the collector of customs, gained a settlement; *R. v. Armouth*, 8 East, 383.

HODGSON v. RICHARDSON.

Concealment
of the true port
of loading will
vitiate a policy
of insurance.

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IN an action on a policy of insurance the case was, that the ship was insured at and from Genoa, [the adventure to begin from the loading to equip for this voyage,] liable to average (*h*); her loading consisting of potash, verdigrease, cotton, and other *perishable commodities. This loading was put on board at Leghorn, the 10th of August, and the vessel had lain at Genoa above five months, being originally bound for Dublin; but, losing her convoy, she put into Genoa the 13th August, and lay there till the 5th January, when she sailed. And the insurance was made the 20th January, at which time these circumstances were known to the insured, but not communicated to the underwriter. A few days after she put to sea she was shattered by a storm, and the cargo considerably damaged. The insured brought his action on the policy, and the jury found a verdict for the plaintiff. And now, *Morton* and *Dunning* moved for a new trial, contending, that the policy was bad *ab initio* for want of a due disclosure of the circumstances; as Genoa, from the wording of the policy, imported to be the port of loading, and the goods were liable to take damage by having lain so long aboard: and therefore, though the present loss actually happened by a storm, yet if the policy was originally bad, the insured cannot recover. And they urged the propriety of granting a new trial here; because the several insurers

(*h*) By this must be understood *particular* average; for if the insurance had only extended to *general* average, the insurers would not have been liable for any loss arising from the perishable nature of

the commodities, either by their having lain so long aboard, or by their having been damaged in a storm. See *Wilson v. Smith*, *post*, 507.

were bound, by a rule of Court, to abide the event of this action (i).

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Norton, Attorney-General, shewed cause:—That the jury have found this circumstance to be immaterial, and they are the proper judges of it. If a latitude is allowed to cavil for want of disclosing circumstances which a jury have judged immaterial, no policy would stand without communicating every circumstance of any the most trifling nature. And, that the rule entered into was intended to abridge, and not increase, the number of trials on one and the same policy.

Lord MANSFIELD, C. J.—It is certainly very beneficial to all parties, that there should be but one trial for all the several insurers on one policy. But then that one trial should be a satisfactory trial. I think that new trials in general are most beneficial for the furtherance of justice, and ought to be granted with great latitude. In all free countries there is allowed for the benefit of the subject a great variety of appeals. And the old law here in England never meant, that the verdict of a jury should by all means be final: but it pre*scribed an odious [*465] way of new trials, by the criminal process of attain. Whereas, the modern course of new trials answers the same end in a better way (k). In the present case, the verdict is such a one as ought not to stand.

The question is, whether here was a sufficient disclosure; i. e. whether the fact concealed was material to the risk run. This is a matter of fact; and, if material, the consequence is matter of law, that the policy is bad. Now who can say, that no risk was run during the five months' stay at Genoa, or no damage happened in that period? The policy is founded on misrepresentation; the ship is insured "at and from Genoa to Dublin, the adventure to begin from the loading to equip for this voyage." This plainly implies, that Genoa was the port of loading. And at the trial all the witnesses said, that by usage it was material to acquaint the underwriter, whether the insurance was to be at the commencement or in the middle of a voyage.

WILMOT, J.—Had this case been a doubtful one, I should not have been for concluding all the insurers by one verdict. But I see no doubt in it. The fact disclosed by this policy is not true, viz. that Genoa is the loading port; for so it must be understood. And in such cases, I will not speculate upon the materiality or immateriality of the fact. Not but that I think, the length of the stay at Genoa is very material in case of such perishable commodities.

(i) *Norton*, A. G., afterwards moved, on behalf of the plaintiff in the other causes, that the respective defendants should pay their money to the plaintiff, pursuant to their agreement: which the Court would not grant, being of opinion, that a consent "to be bound by a verdict in one of many causes upon the same question," means such a verdict as the

Court thinks ought to stand as a final determination of the matter; 3 Burr. 1477; *Cohen v. Bulkeley*, 5 Taunt. 165, acc.: and see *Aylwin v. Favine*, 2 N. R. 430.

(k) See Lord Mansfield's judgment in *Bright v. Eynon*, 1 Burr. 393; *Fozcroft v. Devonshire*, ante, 195, & n. ib.; *Camden v. Cowley*, ante, 418; *Tidd's P.* 912, (ed. 1821).

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YATES, J., of the same opinion. The concealment of material circumstances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may safely say it is not his contract. And I think this fact material, for the reasons before given.

Rule for new trial made absolute (1).

(1) See *De Symonds v. Shelden*, 2 Bos. & P. 153; *Robertson v. French*, 4 East, 130; *Gladstone v. Clay*, 1 M. & S. 418; *Mellish v. Alnutt*, 2 M. & S. 106, and

cases there cited; *Ongier v. Jennings*, 1 Camp. 505, n. (a); and *Cartier v. Boehm*, post, 593.

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LEEDS v. BLACKFORDBY.

S. C. Burr. Sett. Ca. 524.

Wife cannot be removed from a tenement of 10*l.* in the occupation of the husband, though he resides elsewhere, [on the ground that she could not be removed from his estate, he having a subsisting lease at the time of her removal.]

ANNE, the wife of Joseph How, was removed from the parish of Blackfordby, in Leicestershire, to Leeds, in Yorkshire, by order of two justices, dated the 25th June, 1763. Leeds appeals, and on 4th October, 1763, the Sessions confirm the order; stating, that Joseph How, in June, 1761, took a tenement of 10*l. per annum* in Blackfordby, by lease determinable half-yearly at Michaelmas or Lady-day. At Michaelmas, 1761, How and his wife went and resided therein, till Christmas following; from which time to May, 1762, he was sometimes at Leeds, and sometimes at Blackfordby, but his wife and family resided wholly at Blackfordby. In May, 1762, he took a tenement of 20*l. per annum* at Leeds, and occupied it in the trade of a coach-maker till June, 1763. From May to November, 1762, he resided chiefly at Leeds; but, in that time, was twice with his wife and family at Blackfordby. From November, 1762, to the 15th April, 1763, he resided constantly at Leeds, where he was then apprehended by a warrant, and brought into Leicestershire to make provision for his family, which he did; and promised to take them away. But, she being near her time, he and his wife staid in the tenement at Blackfordby from the 18th April to the 15th May, while she lay in. He then took her into Worcestershire, and returned to Blackfordby, locked up the door, and left the key with a neighbour to get in his hay for him. From thence he went to Hunslett, a third parish, and continued there ever since. In the mean time the hay was got in, and still remains on the premises, and is his property. That, about a fortnight since, he ordered the neighbour to deliver the key to the landlord, which was not done; but the key is now in his possession. That his wife, returning to Blackfordby, and asking relief, was removed by this order to Leeds, on 25th June, 1763.

Lord MANSFIELD, C. J.—This removal was premature. The husband could not be removed (and therefore not the wife, who continues part of the husband's family) so long as the tenement continued, that is, not till the occupation

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*was determined. This would have opened the question of the settlement.

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WILMOT, J.—There is no doubt, but her settlement would be, where he last lived forty days. It would be absurd, if a wife could get a settlement distinct from her husband. The derivative settlement must follow the principal. But at present, the removal was unwarrantable. Orders quashed (m).

(m) It appears from the report in Burr. Sett. Ca., that the grounds of the decision of the Court were:—that the husband himself could not have been removed from his own tenement at Blackfordby, the lease whereof was unexpired; and if the Justices could not have removed the man from his own, it follows consequently, that they could not remove his wife and children, so long as it remained his;—that they were

premature in removing them from Blackfordby, whilst his interest there subsisted. *R. v. Aythorp Hooding*, Burr. Sett. Ca., 412, acc. See *Berkhamstead v. St. Mary, North Church*, 2 Bott, 36, as to a wife's gaining a settlement independent of her husband. See also *R. v. Amphill*, 2 B. & C. 847, as to a pauper being removeable, when chargeable.

THE KING v. The Justices of WILTS.

S. C. 3 Burr. 1530.

MOTION for a *mandamus* to the Justices in Sessions, to receive a traverse to a presentment of a highway by a justice upon his own view, under the statute 5 Eliz. (n) in respect to the fact of non-repair; it being an established doctrine at that Sessions, that such presentments are not traversable in that respect. And in behalf of the motion were cited Carthew, 74; 1 Hawk. P. C. 217(o). And the words of the statute were relied on, which makes such presentment “of the same force, as if presented, found, and adjudged by the oath of twelve men” (that is, equivalent to an indictment found by a grand jury, which is clearly traversable in all respects) “saving to every person his lawful traverse, as upon indictments of trespass or forcible entry.”

The fact of non-repair is traversable, when a justice presents a high-way upon his own view.

It was said by Mr. *Athorpe*, the secondary, that it was usual to remove the presentments by *certiorari* into this Court, and turn them into indictments here; and, upon a general traverse, send them down to be tried below. But the statute 5 W. 3, c. 11, which gives the *certiorari*, is only upon condition, that the title to repair comes in question.

YATES, J.—This is setting up a presentment as equal to a conviction: And can any subject of England, even in a summary way, be convicted before he is heard?

WILMOT, J.—There has formerly been a variety of opinions upon this point; and a notion long prevailed, that a justice's presentment was not traversable, as to the matter of *repairs: but not, I believe, within these thirty years past. I think the true notion is, that they are the same as an indictment found by twelve men. The statute only substitutes the presentment, in lieu of the indictment.

LORD MANSFIELD, C. J.—I think there is very strong reason why the whole should be traversable; and the words of the act

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(n) C. 13, s. 9.

(o) C. 76, s. 72.

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are also very strong in favour of the same construction. But I am loth to determine so general a point, upon a motion. And I desire that the Case of *Jacob Hall*(p) may be looked into, who was fined by Lord *Hale*, upon view, for a nuisance erected at Charing Cross.

Adjournatur.

Rule afterwards made absolute, *ex relatione magistri Attorney-General*(q).

(p) 1 Ventr. 169, 1 Mod. 76, 2 Keb. 486, *S. C.*

(q) See *R. v. Stoughton*, 2 Wma. Saund. 157. The several acts relating to highways have been reduced into one by 13 G. 3, c. 78;—a. 24 of which gives to persons affected by any presentment their lawful traverse, as well with respect to the fact of non-repair, as to the duty of repairing.

Such presentment may be removed by the prosecutor by *certiorari* before it is traversed and judgment given thereon; *R. v. Bodenham*, 1 Cowp. 78. See also *R. v. Penderryn*, 2 T. R. 260, 513; *R. v. Winter*, 13 East, 258. The 13 G. 3, has been amended by 34 G. 3, c. 74; 54 G. 3, c. 109; 55 G. 3, c. 68.

The KING v. LATHORP and Others, In-Burgesses of Wigan.

S. C. 3 Burr. 1485.

Constitution of
the borough of
Wigan.

ON motion for an information(r) in nature of *quo warranto* against the defendants, for acting as in-burgesses of Wigan.

The constitution of the borough was admitted to be this: The mayor twice a year holds a Court Leet, and the jurors of the jury must be resident in-burgesses, paying scot and lot, and not any of the aldermen of the borough. This jury, or the major part of them, may elect in-burgesses out of the residents in the borough; and they also name annually three persons, who are stiled benchers, out of whom the in-burgesses, whether resident or not, are to chuse the mayor.

The case was, that on the 6th October, 1760, the prescriptive day for holding the Court Leet, the new mayor being then elected, he, without the presence of any bailiffs, adjourned the court to the 25th. And some doubts subsisting with respect to the validity of this election, it was thought proper to meet again on the *8th October (being the day under the statute 11 Geo. 1), (s) and there the same mayor was again elected, and also adjourned to the 25th. On which day the court met, pursuant to both adjournments; and the defendants were elected in-burgesses, by a majority, viz. 26 against 15.

And now *Aspinal* and *Glynn*, Serjeants, and *Dunning* objected to this election: 1. That the court held on the 6th was not legally adjourned to the 25th, being adjourned without the presence of the bailiffs, who are a constituent part of the court: and that the court of the 8th, being held under the statute,

(r) Under 9 An. c. 20: see *R. v. Carmarthen*, ante, 187.

(s) C. 4, s. 1, which enacts (*inter alia*) that if in any city, borough, or town corporate, no election shall be made upon the day, or within the time appointed by charter or usage, or such election being made shall afterwards become void; the corpora-

tion shall not thereby be deemed or taken to be dissolved or disabled: but the electors are required to meet upon the day next after the expiration of the time, within which such election ought to have been made, unless such day be Sunday, then on the Monday following, and then proceed to the election.

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could do nothing but elect a mayor, and not adjourn. 2. That two of the twenty-six who voted for the defendants were aldermen, and therefore could not serve on the jury. 3. That six more had been disfranchised in 1754, and though restored the 15th September, 1759, in consequence of a *mandamus* directed to the mayor, yet they were illegally restored, being restored by the mayor only, contrary to the opinion of his brethren. 4. That five more were only colourable residents, and not *bond fide* inhabitants of the borough:—And that, taking away these thirteen, the twenty-six are reduced to a minority.

Morton, Wedderburn, Clayton, and Wallace, shewed for cause; 1. That the bailiffs were not constituent parts of the court, and that they were never named in the stile of it, which is only held before the mayor, and not the mayor and bailiffs. That this was a legal election and adjournment on the 6th; and therefore no occasion to call in the aid of the subsequent election and adjournment on the 8th, which was only had *ex majori cautela*. 2. That as to the aldermen, the question had before been twice tried; and the last verdict, now unimpeached, found them not to have been legal aldermen. 3. That, as to the six disfranchised voters they insisted, the disfranchisement was originally illegal, and that they were now regularly restored: and that, in a question regarding the right of the defendants, it was sufficient to shew, they were elected by *burgesses de facto*. To prove which a case was cited, in which Justice *Foster* refused to try the validity of the electors' franchises in an information to try the right of the person by them elected; saying it would be endless, as he knew not where to stop, and perhaps they might endeavour to impeach the right of the electors of those electors. 4. They insisted that the five, who are said to be non-resident, were really and *bond fide* residents: and above all it was pressed, that four years having now expired since the defendants were chosen, and had acted as burgesses, the complaint was now too stale; and it might be of fatal consequence to the being of boroughs, if some rule of limitation was not laid down, after which time no information should be granted; else, a line must be drawn in another place.

Lord MANSFIELD, C. J.—As to the first objection, that the court at which they were elected was incompetent, the adjournment being made without bailiffs, who are a constituent part; the fact of their being constituent parts of the court is affirmed on one side, and denied on the other; both on apprehension and belief. It is urged, that they are not named in the stile of the court, which argument is plausible, but not conclusive; for neither are the jury named, who are certainly a part of the court. Therefore it is necessary, that the information should go, if on this ground only, to try this disputed fact; unless some bar can be set up to estop the whole prosecution. It is contended, that length of time is such a bar, and that it demonstrates such an acquiescence, that you shall not now *quieta movere*. And to be sure, there may be such an acquiescence. What that length of time is, is not, need not, be fixed. It is better not to fix it. nor do I believe it ever will be fixed, either

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Three years' and an half's acquiescence no bar to *quo warranto*.

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Qⁿ. If in *quo warranto* against the elected the rights of the electors can be examined; they being *de facto* possessed of the franchise?

here, or in another place (t). But in the present case, there is no length of time at all; the election was but in 1760. We have no proof of their acting till October or November last. The second general objection is branched into three parts, and all relate to the competency of the electors—1. That of *non-residence. This is a matter of fact, denied on one side and affirmed on the other. It is therefore proper to be tried, unless the length of time is a bar. But that cannot be, for residence is a fluctuating qualification: a man may be resident at one time, and not at another. 2. As to the aldermen, and, 3. The disfranchised burgesses. Objections are raised to these, and those objections answered, principally by averment on both sides. And it is contended, that you shall not try the rights of the electors collaterally in a suit against the elected (v). As to this, we have before said, that the information must go upon the first general ground. And when it goes, the prosecutors will lay their case as widely as they think proper, and the defendants will justify as they shall be advised. The Court cannot restrain the Crown from taking such issues as may be judged necessary. Perhaps the Judge, who tries the cause, may think it right to restrain the evidence from going into the qualification of the electors, as in the case cited at bar before my brother *Foster*. There may be some cases, where it is proper to go into the rights of electors, and others where it is not. This the Judge on the bench must determine; but we are delivered from giving any opinion upon the present case in that respect, because the rules must be made absolute at all events; and we cannot direct the prosecutors in what manner to frame their information; but these points may come regularly in question before the proper judicature at the trial (w).

DENNISON, WILMOT, YATES, Js., *accord*.

The rules for informations were made absolute (w).

(t) By a rule of K. B. in 1791, it was declared, that the Court had resolved in future to limit their own discretion in granting applications of this nature to six years, beyond which time they would not suffer a party to be disturbed; *R. v. Dickinson*, 4 T. R. 284; and see *R. v. Peacock*, *Id.* 684. And 32 G. 3, c. 58, s. 1, enacts, that a defendant in an information in the nature of a *quo warranto* may plead, that he had first actually taken upon himself, or held or executed the office or franchise six years or more before exhibiting the information, to be reckoned from his actual admission thereunto; which plea may be pleaded singly or together with and besides such plea, as he might have pleaded before that act, or such several pleas (*R. v. Astridge*, 8 T. R. 467) as the Court on motion shall allow. By s. 2, the relator may reply a forfeiture. This act only applies to corporate officers, and not to a prescriptive portreeve of a borough; *R. v. Richardson*, 9 East, 469. Exercise of the office for six years before the making the rule for the information *absolute* is sufficient, though it

be for less than six years before the rule nisi; *R. v. Stokes*, 2 M. & S. 71.

(v) On a *quo warranto* against particular members, the title of other corporators *de facto* cannot be gone into; *Symmers v. Regem*, 2 Cowp. 508; *R. v. Mein*, 3 T. R. 596. And by 32 G. 3, c. 58, s. 3, the title derived under an election shall not be defeated on account of any defect in the title of an elector, in case such elector were in exercise *de facto* of his franchise six years previous to filing the information.

(w) As to granting informations, see *R. v. Carter*, 1 Cowp. 58; *R. v. Godwin*, 1 Doug. 397; *R. v. Trevenen*, 2 B. & A. 339, 479; Com. Dig. *Quo Warranto* (C 3); and *R. v. Marsden*, *post*, 579.

(w) Upon the informations being granted, and after rejoinder, the defendant obtained a summons to shew cause, why all proceedings should not be stayed, till a better relator entered into recognisance. Accordingly G. B., Esq., entered into one, and his name was substituted in the information for that of J. G., the original relator; *S. C.* 2 M. & S. 346, n. (b).

TRIQUET v. BATH.

S. C. 3 Burr. 1478.

NORTON, Attorney-General, moved to set aside the proceedings in an action of the case, brought against the defendant for a considerable book-debt, in regard that he was privileged by Count Haslang, the Bavarian Minister, as his servant. And affidavits were read to shew, that he was hired by the Count, as his English secretary, at 30*l*. a year for * board and service, had a written appointment under the Count's hand, and that he, from time to time, had attended at his excellency's house, and wrote and transacted many things relative to the Count's affairs; that he was signified to the Secretaries of State, and his name inserted in the list of protections (x), in the office of the sheriff of London and Middlesex.

English secretary to a foreign minister privileged from arrests, though formerly a trader, and now under very suspicious circumstances.

Blackstone and *Thurlow* shewed for cause; that the application being founded on the stat. 7 Ann. c. 12, or rather the law of nations enforced by that act, it was necessary to consider the doctrine of protections, as laid down by the law of nations and that statute; and to shew that the defendant's case was not within the provisions of either. The immediate occasion of the act was an arrest of the Russian ambassador, which is recited to be contrary to the law of nations, and the privileges of ambassadors: And therefore, in s. 1, 2, and 3, all proceedings had against him are declared to have been void; and all future process, against any public minister, or his domestics, or domestic servants, shall be void. This arises from the *Jus Gentium*, Grot. 2, 18, 8; Bynkershoek de Foro Legatorum, *passim*: That not only the ambassador himself, but such as are *bond fide* his domestics, the *comites legati*, are privileged from arrests and civil suits. In s. 4, a summary punishment is directed for attornies, &c. suing out and executing such process, to be inflicted by the Lord Chancellor and the Chief Justices; the only instance of arbitrary punishment by our law, except in another breach of the *jus gentium*, the violation of safe conducts, wherein, a like discretionary punishment is directed by stat. 31 Hen. 6, c. 4. But in s. 5, are two qualifications of this general law; the first, added in the Lords' House, "That no trader within the description of the bankrupt laws, who shall be in the service of an ambassador, shall be privileged." The other, an amendment of the House of Commons, "That the summary punishment shall not be inflicted, unless the servant be registered, and his name hung up in the sheriff's office." Both these exceptions are agreeable to the law of nations. Bynkersh. c. 15, de Comitibus Legatorum, near the end; "Quæsitum *est, an comitum numero et jure habendi [*473] sint, qui legatum comitantur, unice ut lucro suo consulant,

(x) Under s. 5 of 7 Ann. c. 12. But this is not necessary to entitle a person to privilege; yet, if omitted, the sheriff or bailiff cannot be proceeded against; See-

comb v. Bowiney, 1 Wils. 20; Heathfield v. Chilton, 4 Burr. 2017; Hopkins v. De Robeck, 3 T. R. 80.

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"institores forsan et mercatores. Et quamvis hos sæpe defenderint, et comitum loco habere voluerint legati, apparet tamen satis, eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere *nomenclaturam* comitum suorum, &c."

Our Courts have watched over this privilege with a jealous eye, and held the defendants to strict proof of their qualifications. *Widmore* and *Alvarez*, Hil. 4 Geo. 2, Stra. 797, Fitz. Gibb. 200; actual service held necessary. *Holmes* and *Gurdon* (y), M. 7 Geo. 2, defendant sworn to be an officiating servant, hired for a year at 10*l.* *per annum*; was entered, and had the resident's certificate, as his servant; had often perused the private papers, settled the accounts, and copied foreign letters of the resident, and frequently attended him on private business. On the other hand, it appeared, he was a solicitor in Chancery, and resided in his own house with his wife and family. The Court held, 1st, That the entry and certificate alone were not sufficient to give the privilege. 2dly, That the nature of the service must be shewn. 3dly, That Gurdon was not privileged, because the nature and denomination of the service was not shewn. But, in the last point, *Lee*, J., differed from Lord *Hardwicke*, *Page*, and *Probyn*, on whose opinion the rule was discharged. In *Poitier* and *Croza* (z), T. 23 Geo. 2, the rule was discharged for insufficiency of the affidavits, in not specifying the service done. *Johnston* and Colonel *Stewart*, M. 24 Geo. 2, S. P., and determined accordingly. As to the present case; there is indeed an actual service sworn to, but in very loose and general terms, which may probably extend only to the letters and memorials written upon this very transaction: But it is expressly sworn he was a trader, a mercer in Dublin, [*474] at the time when this debt *was contracted, in 1756; a trade within the description of the bankrupt laws, against which there is no statute of limitation in point of time. And he acknowledges he was a trader, but has not been so ever since 1756. One parcel of goods is sworn to have been personally bought by him in England. And, in *Dodsworth* and *Anderson*, Raym. 375, Sir T. Jones, 141, buying goods in England, and selling them in Ireland, then coming over to England and absconding from his creditors, was held sufficient to make the defendant a bankrupt (a). In *Brettel* and *Carolina* (b), M. 17 Geo. 2, the defendant had not been a trader for four years before; yet the Court held him to be excepted out of the statute, and refused to discharge him. Add to this, the other suspicious circumstances which attend the case. It is sworn, the defendant understands no language but English; therefore an improper person to be secretary to a foreign minister. He is an officer on half-pay, at 15*s.* *per diem*; therefore unlikely to undertake a *bond fide* service for 30*l.* *per annum*, wages and boardwages.

(y) Ca. temp. Hardw. 3.

acc.

(z) *Ante*, 48.

(a) *Allen v. Cannon*, 4 B. & A. 418,

(b) 1 Wils. 78, called *Malachi Caroline's* Case.

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No wages have ever been paid. And Count Haslang (a minister of very humble rank) has more domestics registered, than the ambassadors of the most potent crowns in Europe.

Per Cur.—The principles laid down by the plaintiff's counsel are very just; particularly that this privilege arises from the general law of nations, and not merely from the local statute of Queen Anne, which was made to please the Czar Peter, and sent over very finely illuminated to Moscow. The cases cited are also certainly just, and the present circumstances are very suspicious:—but suspicion alone will not warrant a legal determination. The defendant and his witnesses have sworn up to the requisites necessary by the statute, and the *jus gentium* on which it is founded. They have sworn to an actual retainer to an office by name, and to an actual service in that office. (And by WILMOT, J., I make no question, but the person, who framed the affidavits, was well acquainted with all the cases cited). As to the trading; there is only a single instance, and that of buying only, sworn to in this kingdom; and this is seven *years ago. This objection, therefore, does not seem to be sufficiently supported, in point of fact. [*475]

Rule made absolute, *absente* DENNISON, J. (c).

(c) See *Poitier v. Croza*, ante, 48, and cases there referred to.

TRINITY TERM,—4 GEO. III. 1764.—K. B.

GREEN v. WARING.

MOTION to set aside an award. In a dispute between two partners, all matters in difference were referred to the award, &c. of A. B., in common form. The arbitrator, *inter alia*, directed the partnership to be dissolved. Objected, that he has exceeded his power. *Sed per Cur.*—When all matters in difference were referred, he had clearly a power to dissolve it. If a difference between a master and apprentice were referred, the arbitrators would have a power to order the indentures to be delivered up. And it being sworn, that at the trial, after the juror was withdrawn, and the rule of reference was thus generally drawn up, the plaintiff openly declared, he would not have it understood, that the arbitrator had a power to dissolve the partnership; Lord MANSFIELD, C. J., observed, that is sufficient evidence, *ex ore suo*, that the dissolution of the partnership was then a matter in difference.

If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership.

Rule discharged (a).

(a) See Vin. Abr. *Arbitrement* (B); Com. Dig. *Id.* (E 3); and *Pickering v. Watson*, post, 1117.

SWIFT on demise of NEALE and his Wife *v.* ROBERTS.

S. C. 3 Burr. 1488; Amb. 617.

Will of joint-
tenant not good,
though the joint-
ture is severed
before his death.

A JOINT-TENANT makes his will of lands duly attested; and devises his part of the estate held in jointure with his sister to one Jane Gilbert; and then, by lease and release to A. B., to the use of himself in fee, severs the joint-tenancy (b), and dies without revoking or republishing his will. The question stated on a case reserved on the trial, was, whether any thing passed to Jane Gilbert by this will?

Harvey, for defendant, contended, that his being sole seised at the time of his death was sufficient to establish the will:—That, where the personal ability of the testator to devise is in question, there the will must be considered at the time of making;—where the qualities of the estate or of the devisee are disputed, there at the time of its operation: That, in lands devisable by custom at common law, a joint-tenant's devise was not good; for which the reason is given by Littleton, sect. 287, because the survivorship, which is the act of law, takes place of the devise. But Perkins, sect. 500, says, that, if such devisor survives all his joint companions, then such devise is good. Whether, therefore, by long life or otherwise, the incident of survivorship is removed by any means, and the devisor becomes sole seised, the devise will stand. And after severance of the jointure, the testator is in of the same use as before, only stript of the incident of survivorship: That the statute 32 Hen. 8, c. 1, and its explanatory statute, 34 Hen. 8, c. 5 (c), (which alone requires the sole seisin of the testator), are framed upon the model of these estates, which were devisable at common law; and must receive the same construction.

[*477] *Morton, contra.*—Perkins cites Littleton and Fitzherbert in support of the doctrine he advances. But neither Littleton in his chapter *Joint-tenants*, nor Fitzherbert in the writ *Ex gravi Querelâ* (the places referred to), contain any such doctrine. Littleton only says, a joint-tenant can't devise; and Fitzherbert *is absolutely silent in regard to joint-tenants. Besides, Perkins does not say, that a will made during the jointenancy shall be good, if the testator becomes sole seised; but solely, that when he becomes sole seised, then such devise is good; i. e. such devise as he makes, when sole seised. *Butler* against *Baker* and *Delves*, Poph. 89, is in point: held by the majority of the twelve Judges, that a devise by a joint-tenant is void, though by a deed *ex post facto* he might become, as it were, sole seised; for it is to be considered only, what estate the devisor had in the land at the time of the devise made. A man can devise only what he has: therefore put the case, which Perkins is supposed to have put, that I devise all my estate held in jointure, and after the date of my will my partner dies; what part does that will convey? the whole estate, or only my

(b) Lit. s. 292.

(c) Sect. 4.

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original moiety? This shews the absurdity of such a construction.

LORD MANSFIELD, C. J.—There is no difficulty in this case. The will is of an estate held in jointure with his sister. The only question is, if the will is not void *ab initio*. The deviser had nothing devisable. Wills in England are not, like Roman wills, the creation of an heir to a man's estate. If so, then after-purchased estates would pass by them†. But with us it is, under the statute of wills, a limitation of the estate which a man has. If the will of a joint-tenant could operate at all, it must be by severance of the jointure; but that it cannot do, because the doctrine of survivorship takes place before the will can operate. A feoffment in fee to the use of his will would be a severance. Perkins's *dictum* is very loose. In the first part he rightly says, a devise by a joint-tenant is not good. The devise itself is a bad one. What he means by the latter part, I don't understand. If he only means, that, when he has the whole by survivorship, he may then devise, it is very true; but need not have been so solemnly laid down. And yet perhaps he may mean so, as he *just before lays it down with [*478] equal gravity, that a dean and chapter, who never die, cannot devise lands holden in the right of their church, &c. Besides, he cites Littleton, who only says that joint-tenants cannot devise, and gives the reason; and Fitzherbert, who says nothing about it. Nothing, therefore, can be gathered from so loose a *dictum*‡. However, whatever he means, he speaks only of customary devises at common law. But the stat. 34 Hen. 8. has expressly excluded all devises by joint-tenants. When a will is well made, both the time of making and the time of the testator's death may be considered in order to interpret it. But here the will itself is void *ab initio*.

WILMOT, J.—The statute 32 Hen. 8 gives a power and authority to devise, which did not subsist before. A devise is the execution of this power, and therefore to be construed strictly, especially as the 34 Hen. 8 is an explanatory act. I agree, that as to personal ability and property in the thing devised, the time of making is to be regarded. Try it then by this rule. The stat. 32 Hen. 8 gives the power of devising to persons having lands, &c. Now a joint-tenant has not a devisable estate in lands. No explanatory act was necessary to establish this; the first statute did it sufficiently.

YATES, J.—The question is, whether the severance of the

† “*Mem.*—In the old *Nat. Brev. tit. Ex gravi Querela*, it is laid down, as determined M. 26 Hen. 6; ‘Si un devise terre de que il n'est pas seisi, si apres, il purchase la terre, le devise est bon.’”—*Note by the Reporter*.

‡ “*Mem.*—Perkins does not cite Fitzherbert's *Nat. Brev.* who was his cotemporary at least, if not his junior, and published his book in 1534, but the *Nat. Brev.* with its additions; which means the old *Nat. Brev.* which has additions printed at the end of each writ; and, in the additions to the writ *Ex gravi Querela*, has (as Perkins says) *plures bones cases concernants devises*, the last of which lays down the same rule concerning the devise of a joint-tenant, as is in Littleton. And in very old writers nothing is more common, than to lay down with great solemnity, what we now look upon as first principles, but which then perhaps were not thoroughly known or established.”—*Note by the Reporter*.

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jointure can relate back, so as to substantiate a bad will. *No man can devise what he has not. The form of pleading a will shews this, "That a man was seised of such and such lands, and being so seised, he made his last will, &c." The will could not operate upon these lands upon another account. He describes them as the lands which he holds in jointure with his sister. But he did not hold these lands in jointure at the time of his death.

Postea was delivered to the plaintiff (*d*).

(*d*) *Do v. Tomkinson*, 2 M. & S. 165, ecc. If one joint-tenant bargains and sells his moiety, and dies before the deed is enrolled; yet the deed being afterwards en-

rolled shall work a severance *ab initio*, and support by relation the interest of the bargainee; Co. Lit. 186 a.

THE KING v. BEATON.

Pardon by sign manual how to be worded, and made use of.

DEFENDANT was convicted on an indictment for a violent assault on Mr. Owens, the Secondary of this Court, and had judgment some months ago to pay a fine of 50*l*., to be imprisoned for two years, and give security for five years longer. Afterwards, at the desire of the prosecutor, and for that the defendant was poor, had a wife and five children, and being a cooper could not exercise his trade in prison, the King, by letters under his sign manual directed to the Judges of this Court, signified, that it was his royal pleasure to remit the fine and imprisonment, and willed them to give the necessary directions accordingly. And now *Morton* moved to bring the defendant up to take the benefit of this sign manual.

Lord MANSFIELD, C. J.—The defendant has been ill advised. He should have procured a Privy Seal to bail him in order to plead his pardon, which, it should be suggested, the King intends to grant, in the nature of a circuit pardon (*e*).

"N. B. It seems the method of pardoning upon the circuit (and at the Old Bailey, as it was said by Eyre, Recorder of London) is this. A sign manual issues, signifying the King's intention of either an absolute or conditional pardon, and directing the Justices of gaol delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out; which they do accordingly, taking his recognizance to perform the conditions of the pardon, if any."

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*But by Lord MANSFIELD, C. J.—We can do nothing upon this sign manual; which imports to be a pardon in itself, and should therefore have been under the Great Seal (*f*).

(*e*) 4 Bla. Comm. 400.

(*f*) See the forms of charters of pardon in *Registrum Brevium*, fo. 309, &c. Such pardon, if pleaded, must be averred to be under the great seal; *Bull v. Tibb*, 1 Bos. & P. 199; Com. Dig. Pardon (H). Yet it seems, it would be sufficient to aver, that it was under the King's seal of Great Britain; *R. v. Fendell*, 4 T. R. 533, n. (*a*). As to pardons generally, see 3 Inst. 233; 2 Hawk. P. C. c. 37; Vin. Abr. *Prerogative*

(P. a. 8); Bac. Abr. and Com. Dig. Pardon. As to when serving the period of transportation shall operate as a pardon, see *Bullock v. Dodds*, 2 B. & A. 256; and as to the effect of the sign manual pardon, see *R. v. Miller*, post, 797. By 6 G. 4, c. 26, s. 1, in cases of free pardons the prisoner's discharge, and in cases of conditional pardons the performance of the condition, shall have the effect of a pardon under the Great Seal.

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Afterwards, a new sign manual was procured in these terms:
 "Whereas, &c. (stating the inducements aforesaid) we do hereby signify our intention of granting to the said — Beaton our most gracious pardon, so far as relates to the said fine and imprisonment, upon his giving security for [his] good behaviour for five years according to the judgment of our said Court, and entering into sufficient recognizance for his appearance in the said Court of King's Bench, and pleading our said pardon for his said offence, when thereto required. Our will and pleasure therefore is, that you take due notice thereof, and give the necessary directions accordingly."

This was allowed by the Court, and a rule granted to bring up the defendant; who, on a subsequent day, was brought up and discharged, upon giving bail for the purposes aforesaid.

MYLOCK v. SALADINE.

S. C. 3 Burr. 1564.

ACTION of trespass and false imprisonment. The plaintiff was a shew-man, and had painted a mare to resemble the Queen's zebra, which mare, when examined and the trick discovered, was found to be like a mare which had been stolen from the defendant. Whereupon the defendant took up the plaintiff on suspicion of felony, and after being detained two hours, the suspicion being ill founded, the plaintiff was set at liberty. And for this confinement the action was brought in the Mayor's Court at Chester, where the jury found a verdict for the plaintiff with 80*l.* damages, which was set aside last Term as being excessive, and a new trial granted. And now the *Attorney-General* and *Jones* moved to change the venue from the city to the county of Chester (*g*) upon affidavits, that there was a subscription carried on among the citizens of Chester to maintain this action, Saladine being very unpopular there; that great rejoicings were made upon the verdict's being obtained; and public declarations made, that, though this verdict was set aside, equal damages would * be given on another; so that it was sworn, it was apprehended an indifferent trial could not be had in the city. And it appeared on the Recorder's report, who tried the cause, that one of the witnesses had declared, that when Saladine carried Mylock before the justices upon the original complaint, he forbore to give evidence in his favour for fear of offending the citizens of Chester.

Venue changed on an action of false imprisonment through apprehension of a partial trial.

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Clayton and *Hall* shewed for cause, that the city of Chester contained seven hundred freemen, among whom were many people of fortune, all of whom could not be supposed prejudiced. That the defendant might have his lawful challenges against any prejudiced jurors. They cited the case of the *King* against *Harris* (*h*), Trinity Term, 2 Geo. 3, and denied, by affidavit, any subscription to support this action.

(*g*) Although Cheshire is a county palatine; see *Godfrey v. Philpot*, 2 Ld. Raym. 1418; *R. v. St. Mary HB*, 1 T. R. 735; *Price v. Griffith*, 1 Wils. 222.

(*h*) *Ante*, 378.

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Lord MANSFIELD, C. J.—I have no doubt of the propriety of changing the venue, where an indifferent trial cannot be had, nor of the power of this Court to change it, when such a case appears. A juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him. He should be superior even to a suspicion of partiality. Upon the motion for a new trial, we were all clear from the Recorder's report, which was as sensible and good a one as ever was made to this Court, that the verdict was against the weight of evidence, and that there had been a popular run against the defendant. If the prejudice be general, though not universal, it is sufficient to warrant this rule. It is impossible for the defendant to come at particular facts, so as to form a case for a legal challenge. Here is no universal accusation of the citizens of Chester; only a well-grounded apprehension of danger arising from the general prejudice. The subscription indeed is denied in terms, but elusively. It is not denied that contributions were made; perhaps without any formal subscription. The opposition made to this motion, and the struggle against it, are sufficient to shew that the plaintiff thinks he shall have an undue advantage. Other*wise there is not an *iota* difference, whether he tries it in the city or the county. The town is the same, the time the same, the expence exactly the same.

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WILMOT, J.—If I were otherwise dubious, the struggle would determine me. In criminal cases, where the question was local, there have been frequent motions to change the place of trial, as in the *Gloucester* Case and others. And they were denied upon the ground of locality. But I have always lamented that it could not be done; for I know by experience, that justice can seldom be had within these limited jurisdictions. In the former trial the damages were outrageous, which is an evident argument of prejudice.

YATES, J., of the same opinion. The great difference between this case and those of *Gloucester* and *Nottingham*, is, that here the action is of a transitory, there it was of a local nature.

Rule made absolute.

HARKER v. BIRKBECK.

S. C. 3 Barr. 1556.

Trespass, and not case, will lie for incroaching on a lead-mine; though the plaintiff has no property in the soil above the mine, but only a liberty of digging.

ACTION on the case. The plaintiff declares on an exclusive liberty to dig for lead ore "in the place where:" but that the defendant dug in the same place, and took away ore to the value of 2000*l.* to the plaintiff's damage. On the general issue pleaded, at the trial a special case was reserved; stating, that one Mrs. More, who had no right in the soil, was entitled by lease from the Crown to the sole right of raising lead in such a district, and did, by writing without any stamp, let and set to the plaintiff all her right of digging for lead ore therein. And hereupon, the fact of the defendant's intrusion being proved,

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two questions were reserved for the judgment of the Court; 1st. Whether, for this injury, an action on the case will lie, or an action of trespass only. 2dly. Whether this writing, without stamp, could be given in evidence.

*On the argument there were cited for the defendant, on the second question, the Cases of *Hall* and *Downs*, coram Lord *Hardwicke*, where it was held, that an agreement to let for seven years could not be given in evidence, without being stamped; and *Moor* and *Evelyn*, coram Lord *Raymond*, S. P.

Lord MANSFIELD, C. J.—Upon the first question, it is clear that Mrs. More had the possession of the mine, that she meant to transfer it over, and actually did transfer it. The injury done to that possession is clearly a trespass; and therefore the only proper action is that of trespass, which is a possessory action, and may be maintained against a wrong-doer, even by a *cestuy que trust* in possession. Whatever therefore this writing be, it might (if properly authenticated) be given in evidence, to support an action of trespass. What it is, is difficult to say. If a lease, it ought certainly to be stamped, under the words of the statute (i), “indenture, lease, or deed.” But it is not a lease, for it parts with the whole interest derived from the Crown; neither does it seem to be an assignment of that interest for want of legal form. It seems rather an agreement for an assignment, and till that agreement is executed, it operates only as a declaration of trust. The legal property therefore remains in Mrs. More; but the plaintiff is *cestuy que trust* in possession, and therefore was entitled to an action of trespass, and no other, for the present injury. We are all of this opinion. So there must be

Judgment for the defendant (k).

(i) Stamps are now regulated by 55 G. 3, c. 184: and see *Baxter v. Browne*, post, 973.

(k) *Cary v. Holt*, 2 Stra. 1238, acc. “Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question;” per *Willes*, C. J., in *Lambert v. Strotcher*, *Willes*, 321. So, one in possession of glebe land under a void lease may yet maintain trespass upon his possession against a wrong-doer. Lord *Kenyon*:—“Any possession is a legal possession against a wrong-doer;” *Graham*

v. *Peat*, 1 East, 244. See *Bac. Abr. Trespass* (C) 3, and *Wilson v. Macreth*, 3 Burr. 1824; *Crosby v. Wadsworth*, 6 East, 602. But *Case*, and not *Trespass*, is the proper remedy, where the plaintiff has not the exclusive possession, as for disturbance in the enjoyment of a pew; for the possession of the church is in the parson; *Stocks v. Booth*, 1 T. R. 428: so, for injuries to the reversionary interest; *Jesser v. Gifford*, 4 Burr. 2141; *Bac. Abr. Action on the Case*, (A); *Com. Dig. Action, &c. Nuisance*, (B).

FRANCIS v. WYATT.

S. C. 3 Burr. 1498.

REPLEVIN, for taking a four-wheeled carriage of the plaintiff. Defendant avows the taking as a distress for 75*l*. rent due from Matthew Wilkinson, the defendant's tenant of the coach-house in which the same was taken. To which

A carriage standing at livery is distrainable for rent by the

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lessor of the
premises.

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avowry the plaintiff pleads, that the said coach-house is parcel of certain common coach-houses and stables occupied by the said Matthew, in his business of a common and public livery stable-keeper; and that the plaintiff's carriage was standing at livery there, when distrained by the defendant. To this the defendant demurs, and the plaintiff joins in demurrer. The case was argued last Term, by *Nares*, Serjeant, for the defendant, and *Ashhurst* for the plaintiff; and now

Blackstone, for defendant, argued, that no protection could be claimed for this carriage, 1st, Unless these coach-houses were considered in the nature of common inns; or, 2dly, Unless it is for the public convenience and necessary advancement of trade to protect it in a livery yard. 1st, That they are not in the nature of a common inn, though called in the pleadings common and public coach-houses; since the master of them is not bound to take in horses and carriages, any more than the master of a public boarding-school is bound to receive all boarders, or a common brewer to serve all customers. That the right of putting up horses and carriages in the one arises from private contract; in the other from authority of law; which is the ground of the protection extended to these houses by law. Bro. Distress, 57; 1 Roll. Abr. 688, pl. 12; Co. Litt. 47 a. For it would be absurd, to give me a right to put my horses, &c. into the stables, and at the same time give the lessor of the house a power to take them out. This distinction between the private contract of the parties and the general authority of law, is warranted by the Case of the *Hosteler*, Yelv. 66 (4). 2dly. Where goods, &c. are privileged from necessity or public convenience; it is, where it would be quite impracticable or highly inconvenient to dispose of or manufacture the goods at home. So, corn sent to a mill or a market, cloth to a tailor's, stuff to a dyer's, &c. are protected from any distress; and had the plaintiff's carriage been sent to a coach-maker's to be repaired, it might, for the time, have been privileged; but no such necessity here. By hiring the coach-house (whether by the week, the quarter, or the year) he becomes an undertenant, and must be liable to the landlord's distress, as much as a man who hires an unfurnished room in a lodging-house. Else the landlord might be defeated of that summary remedy which the law allows him by the private contract of his tenant with a stranger.

Clayton, for the plaintiff, argued that many things are privileged from distress, on the score of public convenience: that this was a public livery stable, which are of great utility to the public; and if horses and carriages are not privileged therein, it will put an end to that branch of commerce. And he cited the cases of goods resorting to a fair or market; the horse bringing them; garments at a tailor's; wool sent to be spun; goods sent by a carrier, or left at a common wharf; all which

(†) See also *Yorke v. Grenough*, 2 Lord Raym. 886, 1 Bull. 388.

are privileged from distress: 7 H. 7, 2; Noy, 19; Fitz. Abr. *Distress*; Co. Litt. 47 a; Cro. Eliz. 546, 549; Salk. 249 (m).

Lord MANSFIELD, C. J.—Whatever may be the law of this case, it is worth the defendant's while to consider the consequences of taking such a distress, which will ruin his estate. For if it should be determined, that carriages and horses standing at livery are liable to be distrained by the lessor for rent, the livery stables will all be deserted and undone; for no prudent man will make himself liable to such a hazard. Therefore let this case stand over for farther argument, and let the defendant in the mean time seriously consider, how far in prudence he ought to press the question.

Afterwards, in Easter Term, 1765, 5 Geo. 3, the defendant moved for judgment, and judgment was given for him, upon the ground of its being part of the profits of the premises; which distinguishes it from the case of goods sent to be manufactured, &c. (s).

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(m) Implements of trade are privileged, if they be in actual use at the time, or if there be any other sufficient distress; *Hempson v. Martopp*, Willes, 518, where this subject is fully discussed. *S. P. Gorton v. Falkner*, 4 T. R. 565: there Lord Kenyon, C. J., said,—“We may lay it down as a general proposition, that at this time all moveable chattels are distrainable, whatever may have been said in ancient times to restrain the distress to those things which partook of the profits of the soil. But to this general proposition there are several exceptions; some things are exempt from being distrained, on account of the place, and others on account of the things themselves.” A horse cannot be distrained *damage feasant*, if there is a rider upon him; *Storey v. Robinson*, 6 T. R. 186. And in a late case, where all the

authorities were referred to, it was decided, that goods of the principal in the hands of his factor are not distrainable; *Gilman v. Eiton*, 3 Brod. & B. 75; 6 B. Mo. 243. See also *Clarke v. Gaskarth*, 2 B. Mo. 491; *Clarke v. Calvert*, 3 B. Mo. 96; *Peacocks v. Purvis*, 2 Brod. & B. 362; 5 B. Mo. 79; Com. Dig. *Distress*, (C); Vin. Abr. *Id.* (1); Bac. Abr. *Id.* (B).

(s) Lord Kenyon said, observing upon this case, that the question was, whether a livery stable had the same privilege as a common inn, so as to protect a carriage standing at livery: and that the Court thought that the same reason did not exist in both cases, and therefore that the privilege of the common inn should not be extended to a livery stable; 4 T. R. 567. This seems to be the true ground.

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S. C. 3 Burr. 1516.

DEFENDANT, the 22d October, 1763, drew a bill in London on Sir Charles Asgill and Co. for 70*l.* payable to ship Fortune or bearer, which he gave to Mr. Bignell, the ship's husband, who lost it. It was found by a person un*known, who, on the 25th of October, paid it to the plaintiff, a grocer, in Portsmouth, for a parcel of teas, and took the change, having first made enquiry and found that the drawer was a responsible person. In the mean time Vaughan directed Sir Charles Asgill to stop payment of this bill, which produced this action(o), in which a special jury of merchants at Guildhall found a verdict

Bills, payable to bearer, are negotiable like other bills of exchange.

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(o) It appears from the report in 3 Burr. 1517, that there were two counts in the declaration; one, upon an inland bill of

exchange; the other, an *indebitatus assumpsit* for money had and received.

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for the defendant. And now *Norton*, Attorney-General, moved for a new trial.

Lord MANSFIELD, who tried it, reported that he left two questions to the jury,—1. Whether the plaintiff came by the note, *bond fide*, for a valuable consideration; as to which there was no dispute;—2. Whether, in the course of trade, such draughts, payable to bearer, were usually negotiated from hand to hand. No evidence was given to found this verdict upon, or to shew a distinction between this and other bills of exchange.

Morton, Eyre, and Wallace, for defendant, insisted, that the plaintiff had been incautious in taking a draught drawn in London on a banker there, which, in the course of trade, ought to be tendered immediately for payment; at the distance of three days, in a distant country. That the only question is, upon which of two innocent men the loss must fall; and then the incaution of the plaintiff will turn the balance against him. That this note is no bill of exchange, but merely an authority for the ship's husband to receive the money. That draughts payable to bearer are not intended to be negotiable.—They differ from other bills, in that they are always tendered for payment, and not for acceptance; no days of grace being allowed thereon: and that no contract arises between the drawer and the casual bearer of such a bill, as there does in case of notes of hand or bankers' notes payable to bearer, for which a valuable consideration is always supposed to be given. And they relied on *Horton and Coggs*, 3 Lev. 299; *Hodges and Steward*, Salk. 125; *Morris and Lee*, Lord Raym. 1397; that the draught must be payable to order to make it negotiable, and not to bearer only. So too, *Clerk and Martin*, Lord Raym. 758, and *Nicholson and Sedgwick*, Ibid. 180.

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* Lord MANSFIELD, C. J.—I shall always be more happy in acknowledging an error and correcting it, than in maintaining and persisting in it. I therefore, with great pleasure, take this opportunity to declare, that I am now convinced I mistook in the directions I gave to the jury; as the case came on by surprise, and I had no time to consider it fully. Upon general principles I was struck, and continue still of the same opinion, that since millions of property are vested in this kind of bills, it is unjust not to put them upon the same footing as common bills of exchange. When I left this matter to the jury, I did think, that I had only left a plain fact, as clear as whether there be such a thing as the Bank of England. But I ought not to have left it on the footing of the usage, it being a question of law only, whether such bills are or are not negotiable: and this question, perhaps, the jury understood to be left to them, whereas I only meant to leave it thus: "Whether in fact such bills had usually been negotiated." I think (upon the merits) all the cases in King William's time are founded on mistaken principles. The first struggle of the merchants (which made *Holt* so angry with them, *Ld. Raym. 758*), to make inland bills

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of exchange in the nature of specialties, and to declare upon them as such, was certainly wrong on their parts; as it was admitted, they might declare on general *indebitatus assumpsit*, and give these bills in evidence. But the reasons given by the Judges, why no action can be brought by the holder of such a bill, payable to bearer, are equally ill-founded. First, it is said, they were never intended to be negotiable: *Cujus contrarium est verum*. For when payable "to A. B. or bearer," they are clearly intended to be transferred in the most easy manner, even without indorsement. Also, it is said, that dangers will arise, if, upon a casual loss, the finder becomes entitled (as bearer) to maintain his action for it. But the bearer must shew it came * to him, *bond fide*, upon valuable consideration: [*488] And then there is no more danger here than in losing an indorsed bill of exchange made payable to A. B. or order. It is also said, that the action might be brought in the name of the person to whom it is first payable. In this very case it could not. Can an action be brought in the name of ship Fortune? Many bills are payable to bearer only, without inserting any person's name. And if payable "to A. B. or bearer," A. B. may not be found, may refuse to lend his name, may release, may become bankrupt, &c. which would put the bearer's property on a very precarious footing. Besides this would be giving a third person (the drawee) an option, whether he will pay it to the bearer or no, which may be abused to unjust or corrupt purposes. In *Hinton's Case*, 2 Show. 235, in the latter end of Charles the Second's time, it is taken for granted, that such bills are recoverable by the bearer, if he comes to them *bond fide*. To this succeeded all the cases in King William's time, which adopted the other erroneous principle; and in all these there is great confusion; for, without searching the record, one cannot tell, whether they arose upon promissory notes, or inland bills of exchange. Yet in equity (2 Freem. 258 (p)), it was even then held, that a bill payable "to A. or bearer" was like so much money paid: whatever transactions may be between A. and the drawer of the bill, the bearer shall have his whole money. And, in *Salkeld*, 126, *Holt* held, that if a bank note be lost, payable to A. or bearer, and a stranger, who finds it, transfers it to C. for good consideration, trover will not lie against C.; because, by the course of trade, there is a property in the assignee or bearer. The statute, 3 & 4 Ann. c. 9, subsequent to these cases, was made to put promissory notes, in all respects, upon the same footing as inland bills of exchange. The statute expressly provides for notes payable to bearer; and therefore it may reasonably be construed to suppose, that such was the law for bills also; for else it would make a promissory note more negotiable than a bill of exchange. There has since been no doubt, but that actions may be brought by bearers of such promissory notes against the draw*ers. In a [*489]

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late Case, *Miller and Race*, a bank note, though stolen out of the mail, yet being negotiated and coming to the bearer *bond fide*, was held recoverable (q). In *Walmesley and Child* (r), the defendant gave a shop note to A. or bearer; A. lost it, and demanded the money at Child's. They agreed to pay, if he would give them security, that the note should never be forthcoming to charge them. He refused, but offered a release, being advised that no action could be brought by bearer in case A. released. They still refused, and a bill was brought to compel the payment. Lord *Hardwicke* dismissed it, unless A. would give security. It appeared, that in their books no credit was raised but to bearer. Bearer debtor, and bearer creditor. No other name made use of in entering this sort of note(s). As this is my opinion in point of law, and as I unadvisedly left this point to the jury, there must be a new trial upon the ground of my misdirection. And as both parties are innocent men, I think the law should decide between them, and not leave it to the partiality of the drawee to pay whichever he likes best.

WILMOT, J.—If both are equal in point of justice, *melior est conditio possidentis*. I know not how any remedy can be had, unless the bearer can maintain this action. The word *bearer* is only a description of the person with whom you contract. A name is only a like description. The contract is to pay the bill, either to you, or to the person to whom you shall deliver it, or to whom he shall deliver it, *in infinitum*. It is clear, that if the drawee pays it, it is good payment; and the case in *Showers* is a clear authority, that a *bond fide* holder may recover. The subsequent cases are ill-founded, and strike at the root of credit; for if only the person named in the bill can bring the action, who would ever take it in payment? But had they been well founded, the statute of Queen Anne is decisive. Bills of exchange are only promissory notes to pay such a sum, in case the drawee does not.

YATES, J.—I am clear that the jury did wrong. In an ac-

(q) 1 Burr. 452. Where the plaintiff had received it for a valuable consideration, and without notice of its having been stolen; upon delivering it at the bank for payment, the defendant, a clerk in the bank, refused to pay or redeliver it, having been desired to stop payment by the person who had lost it; upon which the plaintiff brought trover and recovered. But where trover was brought by an agent of the holders for a bank note, which had been fraudulently obtained from A. B., who had acquainted the bank therewith; and when, on its being presented for payment by such agent, who, at the desire of the bank, wrote to his principals for information, they would give no further account of it, but that they had received it from a person of whom they knew nothing; and it was further proved, that such bills were

not usually circulated in the country where they resided, on which the bank detained it: It was held, that this was sufficient evidence of their privacy to the original fraud, and therefore that their agent could not recover, although, after notice, he had made payments for his principals, which turned the balance in his favour; *Solemnus v. Bank of England*, 18 East, 135, n. (e).

(r) 1 Ves. S. 341.

(s) "But upon the second count, the present case is quite clear, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use may be brought by the *bond fide* bearer of a note made payable to bearer. It was certainly money received for the use of the original advancer of it: and if so, it is for the use of the person who has the note as bearer;" *per* *Ld. Mansfield*, 5 C. 3 Burr. 1535.

tion for money had and received, the bearer, who had *paid the money, had a right to call upon the drawer himself who had received it; *Ward and Evans*, Lord Raym. 928 (t).

Rule for new trial made absolute (v).

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(t) But that case was in substance as follows: One Fellows owed the plaintiff 60*l.*, which he desired the defendant to pay for him; the defendant at the same time owed Fellows 100*l.* upon a note. Fellows indorsed a receipt on that note for 60*l.*, as so much money received from the defendant: defendant then gave the plaintiff a note for 60*l.*, drawn by A., and payable to B. or bearer. A. became insolvent the next day, and the plaintiff then brought his action for money had and received. And the Court held that such action well lay; "for when the 60*l.* was indorsed on Fellows's bill, as so much actually paid by the defendant to Fellows, Fellows directing that sum to be paid to the plaintiff, and the defendant having the money in his hands, it amounts to a receipt of so much by the defendant to the plaintiff's use." And see *Yates's* opinion in 3 Burr. 1522.

(v) Where a bill of exchange with a blank indorsement has been stolen, and afterwards comes into the possession of an innocent indorsee, without notice, for a valuable consideration, he may recover upon it against the drawer; *Peacock v. Rhodes*, 3 Doug. 633; or against the acceptor; *Lawson v. Weston*, 4 Esp. 56. So where a bill was drawn by the defendant and others upon the defendant alone, payable to a fictitious person "or order," (all

parties to the drawing the bill being acquainted with that circumstance), and the defendant had received the value from a second indorser; it was held that a bona fide holder might recover the amount in an action against the defendant, the acceptor, on the count for money paid or money had and received; *Tallock v. Harris*, 3 T. R. 174; 8 P. *Per v. Lewis*, Id. 162. In a similar case it was held, that the holder might recover as on a bill payable to bearer; *Ellist v. Gibson*, Id. 481; confirmed in D. P., 1 H. Bl. 569; 8 R. *Collie v. Emmett*, Id. 813. But then it must be shewn, that the acceptor was acquainted with the circumstance of the payee being a fictitious person. For where that was not proved, Lord Ellenborough held, that the holder could not, either as the mere bearer, or as the indorsee of the drawer, who had indorsed it in the name of the fictitious payee, sue the acceptor upon the bills. If however the money paid by the holder as the consideration for its being indorsed to him get into the hands of the acceptor, the holder may recover it back, as money had and received; *Bennett v. Farnell*, 1 Camp. 130, 180 c; and see *Gibson v. Hunter*, 2 H. Bl. 187, 268. See also *Dennis v. Scott*, 1 Camp. 100; *Ross v. Mangles of Headfort*, 3 Camp. 574. Bayley on Bills, 52, 263 (ed. 1813).

Bishop of LINCOLN and WHITEHEAD v. WOLFERSTAN.

S. C. 3 Burr. 1504.

ERROR from the Common Pleas. In *quare impedit*, the plaintiff Wolferstan shews title and seisin in Elizabeth Gresley, Sir Nigel Gresley, and Francis Vincent; and that they, by deed dated 9 November, 1759, which he brings into Court, granted the advowson of the north mediety of Great Sheepy, com. Leicester, to the plaintiff, Edward Wolferstan, his heirs and assigns, and sets forth the statute, 21 Hen. 8, c. 13 (u), which enacts, "That if any person, having one benefice with

Grant of an advowson after institution of the clerk to a second living is void (u): But no lapse incurs till after induction to the second.

(u) This is to be understood, that the grant is void only as to the presentation to the vacant turn; and it is so expressed in S. C. 3 Burr. 1510, viz. that a grant of a next presentation, or of an advowson made after the church was actually fallen vacant, was a void grant, *quoad* the fallen vacancy. S. P. *per De Grey, C. J.*, in *Barrett v. Glabb*, post, 1034, who says, alluding to the marginal abstract of this case in 3 Burr.,

that it is an inaccuracy to say that the Court held it was absolutely a void grant; *Greenwood v. Bishop of London*, 5 Taunt. 727, 1 Marsh. 292, acc. Yet Lord Hardwicke, C., in *Grey v. Hesluth*, Amb. 268, says, that the sale of an advowson, during a vacancy, is void at common law.

(u) Sect. 9. Extended to churches, curacies, and chapels, augmented by Queen Anne's bounty, by 36 G. 3, c. 83, s. 3.

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"cure of souls of the yearly value of 8*l.* (x), should accept and take any other with cure of souls, and be instituted and inducted in possession of the same; that then, immediately after such possession had, the first benefice should be adjudged to be void, and that the patron might present, as if the incumbent had died or resigned." That the said north mediety of Great Sheepy is of the value of 8*l. per annum*, with cure of souls, and that the incumbent thereof (Thomas Gresley) 22 December, 1759, accepted and took the rectory of Great Seale, in the same county, and afterwards, viz. the said 22 December, was instituted and inducted to the same; whereby the said north mediety of Great Sheepy became vacant; and that it belongs to the said Edward Wolferstan to present, but that the Bishop and said Whitehead disturb him, &c. The Bishop in his plea disclaims all title but as ordinary, and confesses the title and seisin in Elizabeth Vincent, Sir Nigel Gresley, and Francis Vincent; but says, that the incumbent Thomas Gresley, on 31 October, 1759, accepted the rectory of Seale, and was then instituted to the same, as by the said Edward in his declaration is alleged; whereby the said north mediety of Great Sheepy became vacant, and so remained for six months (y); whereupon the right of collating devolved by lapse to the said Bishop, as ordinary. Wherefore the said Bishop, after the said six months, collated thereto his clerk the defendant Whitehead.

- [*491] *Whitehead, in his plea, alleges, that he is parson imparsonce, and that the church became void by Thomas Gresley's acceptance of Seale 31 October 1759, and so remained till 20 June 1760, when the Bishop collated him thereto. To the Bishop's plea the plaintiff replies (protesting he had no notice of the avoidance before 22 December), that on 22 December, and not before, Gresley was inducted to Seale, and that within six months after, viz. 29 March, 1760, he presented Thomas Hall his clerk, and requested the Bishop to admit and institute him; which he refused, and afterwards, viz. 20 June, 1760, collated the defendant Whitehead. To Whitehead's plea he replies to the same effect. The Bishop, in his rejoinder, admits the induction of Gresley, 22 December, 1759, and that the plaintiff did present the said Thomas Hall within six months after; but that, before the said 22 December, viz. on 31 October, the said Gresley accepted and took the said rectory of Seale, and was instituted thereto, whereby the said north mediety of Great Sheepy became vacant; and that the said Hall did not, within six months after such vacancy, or before the collation of Whitehead, offer himself to be instituted; and traverses, that he did, before the said collation of Whitehead, refuse to admit the said Hall. Whitehead, in his rejoinder, admits the induction of Gresley 22 December, but says, that Great Sheepy became vacant by his institution, 31 October before, and remained so till 20 June, 1760, when the Bishop collated, by lapse, the

(x) That is, according to the valuation in the King's books; 3 Burn's Ecc. Law, 95.

(y) As to the computation of which, see *Talbot v. Lingfield*, ante, 450, n. (a).

said Whitehead; and further, that, on 31 October, 1759, the plaintiff had nothing in the advowson. To both these rejoinders the plaintiff demurs, and assigns many special causes of demurrer; and the defendants join in demurrer. And, after several arguments in C. B. the Court gave judgment for the plaintiff (x).

Blackstone, for the plaintiffs in error (the defendants below), waved entering into the pleadings, till the counsel for the defendants should rely on particular exceptions; but insisted, that, if there were any defect in the rejoinders, the replication was previously bad by introducing new matter, which does not avoid the force of the defendant's plea, *vis.* the fact of induction, without confessing or denying the fact of institution, alleged by the plaintiffs below. And, in respect of the merits, he argued,—

1. That, when a church is void, the advowson cannot be granted over, as well for the danger of simony, as also, because it is a *chose in action* (a); *Dyer*, 26; *Jenk.* 236; *Dyer*, 282; *Cro. Eliz.* 600, *Bennet* and Bishop of *Norwich*; *Ibid.* 788, *Baker* and *Rogers*. And *Agard* and Bishop of *Peterborough*, *Anders.* 15; *Dyer*, 129; *Moor*, 12; *Bendl.* 43; which hold the law to be so, in respect of the present avoidance. So a lease of the advowson for twenty-one years, granted after vacancy, is void for the present avoidance; *Stevens* and *Disley*, *And.* 15, *Bendl.* 192. The like of a grant of an advowson in fee; *Leak* and the Bishop of *Coventry*, *Cro. Eliz.* 811.—2. That, when a church is void for six months, and no presentation offered, the Bishop may collate in right of lapse, which is too clear to need being supported by authorities.—3. That the church of Great Sheepy did actually become void by *Gresley's* institution to *Seale*, on 31st October, 1759; so as to prevent any grant of the advowson, and so as that the *tempus semestre* (b) for the Bishop's lapse did then begin to incur. To be sure, the words of the stat. Hen. 8 are, "Upon institution and induction;" and yet, in *Digby's Case*, 4 Rep. 78 (reported *Moor*, 434, and *Goldsb.* 162, under the name of *Robins* and *Prince*), it was held, that institution alone to a second makes the first benefice void; so that no dispensation will operate to make them tenable together. Else a man might be instituted to several benefices, and never inducted, but obtain a sequestration, and so elude the statute. This case unanimously ruled by all the twelve Judges, *Moor*, 448; and recognized as clear law, *Hob.* 157, 158. If then, in these circumstances, it is so void as not to be the object of a dispensation, it cannot be the object of a grant. And if not presented to within six months, the lapse to the Bishop shall accrue; for it is completely void. Else the statute might be eluded by connivance of the patron and ordinary, in case the clerk defers his induction: for if lapse does

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(x) 2 Wils. 174, where the pleadings are set out at length.

(a) Lord *Mansfield* and Mr. *J. Wilmot* both said, that the true reason why a grant of a fallen presentation, or of an advowson, after avoidance, is not good, quoad the

fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its being then become a *chose in action*; 3 Burr. 1512.

(b) *Ante*, 450, n. (a).

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not accrue to the immediate ordinary, it cannot accrue either to the Archbishop or the Crown; 2 Roll. Abr. 367 (c). If a clerk be only instituted to the first living, and afterwards accepts a second, the first is clearly void: so adjudged in Common Pleas, *Digby's Case*, 4 Rep. 79. A plurality, therefore, so as to cause a vacancy, may commence by mere institution to one of the livings, and it is indifferent (in point of reason) whether that one be the first or the second living. Objected, that as institution is a matter of spiritual cognizance, notice must be given to the patron before lapse shall begin to incur. To this I answer—1. That, as induction has in fact been had, it shall relate back to the time of institution. It is allowed, that the patron must take notice of induction. He must know that institution has preceded it, and is bound to enquire when that institution was given.—2. If no induction had followed, then if no lapse can incur till notice of the institution, the patron and ordinary might combine (as before observed) to defeat the statute, and put livings of 8*l.* value upon the same footing as those under 8*l.*, which render a prior benefice only voidable, and not actually void. For, by the common law, which adopted the decrees of the Lateran Council, upon the clerk's accepting a second living the patron might present to the first, be it of any value whatever. But no lapse could incur till the clerk was canonically deprived, and notice thereof given to the patron; Godb. 23. By the statute, if of 8*l.* value, the first is *ipso facto* void, without any sentence of deprivation; *Armiger* and *Holland*, 4 Rep. 75, Cro. El. 601: and the same is laid down, Dyer, 237. And no notice is requisite in this case, the avoidance being by act of Parliament, and not by canonical deprivation. In *Shute* and *Higden*, Vaugh. 131, it is said by the Court, that, according to *Digby's Case* and *Holland's Case*, institution to a second living so vacates the first, that the patron may present, if he will: but no lapse shall incur till deprivation, and notice. But if the first is of the value of 8*l.*, or above, the patron at his peril must present. So in cases of avoidance for non-payment of tenths, by stat. 26 Hen. 8, c. 3, the patron must take notice at his peril. Watson, 40. Besides, who is bound to give notice? Not the Bishop, who institutes to the second living, for he is an entire stranger to the first: nor the Bishop who is ordinary of the first living, for he is a stranger to the fact of institution to the second. And therefore, Bishop Gibson says truly, Cod. 769, that notice is only necessary, where the avoidance is occasioned by an act between the incumbent and the ordinary of the vacant living. And, by the rules of the common law, Cro. Car. 392, Cart. 172, where notice ought to be given, the law appoints who shall give it; and if none is bound to give it, the party shall take notice at his peril.

Burland, Serjeant, for the defendant in error, gave up the point of title in his client in case the Court could take notice

from the pleadings, that the institution of Gresley to Seale was prior to the grant of Great Sheepy to Mr. Wolferstan. But he insisted, that lapse did not begin to incur till after induction to the second living; and cited *Moor*, 484; *Lyndewode*, 185, 137, 188, from whence the wording of the statute Hen. 8 is copied; and therefore the construction must be the same: That in *Agard* and Bishop of *Peterborough*, issue was taken on the induction, which shews, it was thought to be the material point.

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Per Cur'.—You need not labour that part of the question. It has been determined over and over that the second living is not accepted so as to create a lapse, till induction. *Digby's Case* extends only to dispensations, and is by no means a general rule (d).

Que de Cos?

Burland.—Then, as to the first point, we say, it is not materially averred in the pleadings, that institution was given on 31st October, but only under a *scilicet*, which is not traversable; and any other day may be given in evidence, previous to the 22d of December; for that is the material allegation, that Gresley was instituted before the 22d December, (*viz.* 31st * October) which specification is only circumstance, and if repugnant to the matter before alleged, is merely void and shall be rejected; *Yelv.* 122; *Skin.* 660; 2 *Lev.* 11; 5 *Mod.* 286. That *Whitehead's* rejoinder is plainly a departure (e), by alleging, for the first time, that the plaintiff had nothing in the advowson†. That if the replication was informal, the plea was worse by not confessing, traversing or avoiding the fact laid in the declaration, that the living became void the 22d December;

Qn. Whether
the time alleged
under a *scilicet*
is materially
averred.

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† “*N. B.* The truth was, that the pleaders had never before observed the flaw in the plaintiff's title; but originally meant to try only the question, whether the institution or induction occasioned the vacancy.”—*Note by the Reporter.*

(d) For to an avoidance by 21 H. 8, c. 23, an induction into the second living is necessary by the express words of the act, s. 9; and it would be unreasonable if it were not, because the patron is at his peril to take notice of such avoidance, 4 Rep. 75 b, 76 a: for institution is a private act, but induction an act of notoriety. But where the first living is not of the yearly value of 8l. in the King's books, there the same will not be void by the statute, but only by the canon law, and therefore no lapse will incur in this case without notice; 4 Rep. 75 b: but with notice it seems it will; *Ib.* And it was resolved, 4 Rep. 79 b, and as appears by *Moor*, 448, agreed to by all the other Judges of England, that it would be very inconvenient, if the first benefice should not be void by institution to the second by force of the canon there mentioned; for then one might be instituted to divers benefices with care, and no other could be presented to any of them: and therefore in this last case the patron may present without notice, if he pleases; *MSS. Serj. HILL.* The Court of

C. P., when this case was before them, were clearly of opinion that the church was so void upon institution to the second living, that the patron might present immediately thereupon, if he pleased; but that the Bishop had no right to collate by lapse without giving notice; 2 *Wils.* 201. Institution is the investiture of the spiritual part of the benefice, and is given by the ordinary to the clerk, kneeling before him, in these words; *Instituo te rectorem ecclesie parochialis de C., et habere curam animarum, et accipere curam tuam et meam.*—When instituted, the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them till induction, which is the investiture of the temporal part, and is performed by the archdeacon or his deputy giving the clerk corporal possession, as by delivering to him the ring of the church door, or the bell-ropes to toll the bell, similar to *Every of usain.*

(e) 2 *Wms. Sound.* 84 a; *Com. Dig. Pleader*, F. 7.

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but merely stating a new fact, the vacancy by institution on the 31st October, as the plaintiff had before alleged, whereas he alleges no such thing.

And of this opinion was the Court, that the time of institution was not materially averred in the rejoinder, being only under a *scilicet*; and that the plea was bad for the reasons given by the Serjeant: and therefore they affirmed the judgment, unless cause shewn before the end of the Term.

Afterwards *Blackstone* shewed for cause, that the true distinction is, that where the time at which a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is absolutely nugatory, and is therefore not traversable; and, if it be repugnant to the premisses, it shall not vitiate the plea; but the *scilicet* itself shall be rejected, as superfluous and void. But, where (as in a question of lapse) the precise time is the very point and gist of the cause, there the time alleged by a *scilicet* is conclusive and traversable, and it shall be intended to be the true time, and no other; and if impossible or repugnant to the premisses, it will vitiate the plea; if true, will support the defence (*f*). (And this distinction he was prepared to support by authorities, *viz.* Latch. 209; Cro. Jac. 96, 428; Stra. 233; Cro. *Jac. 618; Yelv. 93; Latch. 200; and especially *Skinner* and *Andrews*, 1 Saund. 169). And then, though the plea be informal in other respects, yet if sufficient dates appear on the pleadings, the Court will pick out a good defence, though the pleaders happened to overlook it.

But by *WILMOT* and *YATES*, Js.—When the plea is bad, it is a mere nullity; and from a nullity you can gather nothing: but the declaration, which states a good title in the plaintiff, stands alone and unanswered. Therefore, though this is a very hard case, yet *per tot. Cur.* (*absente* DENNISON),

The judgment must be affirmed.

(*f*) Mr. Serjeant Williams says, that this difference taken by Blackstone is well founded; 2 Wms. Saund. 291 c: see also 1 Wms. Saund. 170, n. (2); *Gunmakers'*

Comp. v. Fell, Willes, 390; *Grimwood v. Barrit*, 6 T. R. 462; *R. v. Stevens*, 5 East, 244.

SWAN v. BROOME.

S. C. 3 Burr. 1595.

If the vouches die on the return day of the writ of summons, being Sunday, the recovery is bad; *post*, 526.

ERROR from the Common Pleas on a common recovery, in which Thomas Broome was demandant, George Green the tenant, and Edward Swan the elder and Edward Swan the younger were vouched, and vouched over the common vouches. The writ of entry was returnable *crast. Pur.*, on which day the writ of summons (*g*) was tested, and made returnable in one

(*g*) The writ of summons, or *summons ad warrantandum*, should be tested within four days inclusive from the return of the writ of entry or *precipe quod reddat*; *Barnard v. Woodcock*, *post*, 1201; *Cruise's*

Rec. 119: and the writ of summons must now (by 24 G. 2, c. 48, s. 8) have four returns, both inclusive; *Ibid.* Where the vouches appears by attorney, the warrant of attorney should bear date after the teste

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month of Easter. The error assigned was, that the return of the writ of summons was on Sunday the 13th of May, on which day it is entered on the roll that the vouchees came, &c.; whereas in fact, on that day Edward Swan the younger died.

Walker, for the defendant in error, argued, that the judgment was given during the life of Edward Swan, for it shall relate back to the first, or essoign, day of the Term (*k*). Every Term has several returns. Each return is divided into several remarkable days; 1. The essoign day: 2. The day of exceptions: 3. The return day: 4. The *quarto die post*, the *dies amoris*, or day of grace. In *Stanford* and *Cooper*, Cro. Car. 102, a statute was acknowledged *22d January: a judgment entered the 23d: determined, that the judgment related back to the essoign day, 20th January, and therefore was prior to the statute. *Dyer*, 361 a; a release on 21st January shall not stop the taking an inquest on the 23d, by a plea *puis darrein continuance*; for the continuance, on which the inquest is by relation taken, is on the essoign day, January 20th. Litt. Rep. 185; the essoign day is the return of the writ. 1 Bulst. 35; judgment in full Term shall have relation to the essoign day. Stra. 882, *Fuller* and *Jocelyn*; the party died 18th April; judgment signed the 22d. It shall have relation to the 15th, which was the first day of Term, and be valid (*i*). The statute of frauds (*k*) has respect only to purchasers, and is therefore conclusive, that in other cases judgment shall still relate to the first or essoign day of the Term. 2dly. If the Term must be divided, because the writ of summons is expressly returnable in one month of Easter, still the judgment must relate to the essoign day of that return, *vis.* 13th May; on which day Edward Swan was living. Objection 1. Judgment shall not be intended to be given till the 16th of May, the *quarto die post*; it being a judgment by default, according to the distinction in 1 Bulstr. 35. Answer. It appears by the record, that Edward Swan was present in Court on the return day, therefore it is no judgment by default of his appearance. Objection 2. The return day is on a Sunday; therefore, it cannot be intended, that judgment was given that day, but, at soonest, on the Monday following. Answer. Sundays have been differently considered, in different nations, and at different periods. Vide stat. 28 Ed. 3; 27 Hen. 6, c. 5; 4 Ed. 1, c. 51; Co. Litt. 135 a; stat. 5 & 6 Ed. 6, c. 3; 1 Eliz. c. 2; 1 Car. 1, c. 1, and [29 Car. 2, c. 7] (*l*). Sales made on a Sunday are good; Cro. Eliz.

of the writ of summons: but as the vouchee may appear in person without any summons, if the warrant of attorney to vouch bear date before the writ of summons, the recovery will be good, though the warrant and other process be void; for it shall be intended, that the vouchee being present in Court made the attorney; *Wynns v. Lloyd*, 1 Lev. 130, 1 Sid. 213.—See also *Wynns v. Thomas*, Willes, 563, 7 Mod. 492; 2 Wms. Saund. 424; F. N. B. [134]; Co. Lit. 101 b.

(A) The essoign day of Easter Term in

that year was the sixth day of May. The essoign day is in reality the first day of Term; but commonly speaking the appearance day, or *quarto die post*, is so considered.

(i) See also *Belk v. Broadbent*, 3 T. R. 183; *Bolton v. Eyles*, 2 Brod. & B. 51; 4 B. Mo. 425.

(k) 29 C. 2, c. 3, s. 15.

(l) See the cases and statutes collected in Burn's Just. tit. *Lord's Day*; Com. Dig. *Temp.* (B 3).

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485, *Comyns and Boyer*. In the present year, 1764, out of 17 general return days, 9 (the greater part) are on Sundays:— 7 must always be so. In all cases, unless prohibited, Sunday is a good legal day. Cro. Jac. 59; the Term was adjourned on a Sunday. Dyer, 154 a; entry of an essoign shall be on the Sunday, and not on the *Monday following. The stat. 29 Car. 2, c. 7, s. 6, is confined only to serving writs or executing judgments on Sundays^(m). And the prohibition proves what the rule was before the prohibition made. *Vide etiam Alsop and Nicholls*, Common Pleas, 1 Barnes, 207⁽ⁿ⁾, *et cas. ibi citat.* Thus far upon technical reasons; but if we consider recoveries in their more enlarged and sensible construction, as the mode of conveyance by tenant in tail, who in his life-time had completed every material act, the present case will be entitled to favour; and the Court will avail themselves of technical niceties to substantiate this mode of conveyance.

Hewit, Serjeant, for the plaintiff in error, argued, 1st. That when the writ of summons issues, the party cannot be intended to appear either in person, or by attorney, till the day of the return; 1 Leon. 86. 2dly. That there can be no judgment, but on the appearance or default of the parties, on the return day of the writ of summons. For the not answering the writ of summons was a breach of the feudal duty, and the lord thereupon might seize the lands and give them to the demandant, who became his tenant; and thereupon the writ of *grand cape* is founded. See for the process on default on recoveries; Rastal. Entr. 240, 286; Booth's Real Actions, 43, 44, c. 17. 3dly. That no judgment can be intended to be given on the precise day of the return, which is Sunday, and therefore *dies non*; but on the morrow, being Monday, the day after Edward Swan died. To support which, he cited 6 Mod. 196, Salk. 626; 6 Mod. 250, *Davy and Salter(o)*; Cro. Jac. 16; Cro. Car. 11, where it is held, that Monday is always considered as *Tres Trin.* in contemplation of law. Plowd. 265 a; proclamations of a fine on a Sunday are ill, because the justices cannot sit in bank on a Sunday. 1 Vent. 7; an original tested on a Sunday is bad. 2 Saund. 291; Court Leet cannot be held on a Sunday. *Wynn and Wynn(p)*, alias *Wynn and Apperley*, Trin. 18 Geo. 2; held, that when the party died before [the return of] the writ of summons, the recovery was wholly bad, and could not relate back to the first day of the Term.

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**Walker*, in reply, allowed, that judicial writs must be returnable on such day within the Term, as the Court sits upon; because the Court did not anciently sit on every day, but appointed certain special days for the parties to appear and answer. Wherefore, if judicial writs are tested or returnable on a Sunday, they are bad. But he insisted, that the law was

(m) See *Brookes v. Warren*, post, 1273, and cases there referred to.

(n) Pa. 293 (8vo. ed.).

(o) So a writ of enquiry cannot be executed on a Sunday; *Hoyle v. Cornwallis*,

1 Stra. 387, Fort. 373.

(p) 1 Wils. 35, 42, Willes, 563. S. P. *Sheepshanks v. Lucas*, 1 Burr. 410; *Gibbons v. Stevenson*, post, 1224.

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otherwise of original writs, the Court being always supposed to sit on the general return-day; which distinguishes them from the by-acts of the Court, such as proclamation of a fine, &c.

Lord MANSFIELD, C. J.—When the Terms were first framed, and so many return-days were made on Sundays, can it be supposed, that the Court did not then usually sit on Sundays? I myself have sate in Parliament on a Sunday†. In Venice they sit on Sundays to administer justice. The Rota sits on Sundays.

Uterius concilium.

[*S. C. Post, 526.*]

† “*N. B.* It appears from the Journals of the Commons, that, upon the sudden death of his late Majesty, King George the Second, both Houses of Parliament met at two o'clock, *die Dominico*, 26 Octobr. 1760, pursuant to the statute of Queen Anne; but the Lord Steward not appearing to administer the oaths, they departed without proceeding to business, or making any formal adjournment.”—*Notes by the Reporter.*

EVANS on Demise of BROOKE v. ASTLEY.

S. C. 3 Burr. 1570.

SPECIAL verdict in ejectment at the Great Sessions of Chester. 19th of February, 1723, Sir Samuel Daniel made his will, written with his own hand; and thereby “gave, granted, devised, limited, and appointed all his manors, lands, and tenements, in Over-Tabley, &c. in the county of Chester, and all other his manors, &c. *wherein he had any manner of estate*, in the said county of Chester, to Samuel Duckenfield, son of Charles Duckenfield, of Mobberly, Esq. during his na^tural life, and the heirs male of his body, lawfully to be begotten: and for want of such issue, to Charles and John Duckenfield, two other of the sons of the said Charles Duckenfield, successively, in the same words: *and for want of such issue, then to every son and sons of the said Charles Duckenfield, Esq. which shall be begotten on the body of Sarah, his now wife: and for want of such issue, then to William Hulton (and afterwards to Samuel Goldston and James Goldston, successively, in the same words) during his natural life, and the heirs male of his body, lawfully to be begotten: and for want of such issue, to the right heirs of the said Samuel Daniel for ever.*” With a proviso, “that the estates so limited to the said Samuel Duckenfield and others should be on condition (*q*), that he, and they, and their descendants, to whom the premisses shall come, shall procure an act of Parliament to take and use the name and arms of Daniel.” And, by the said will, he gives power to every person in possession to *let leases* for three lives, on certain terms therein mentioned, and to make a *jointure, not exceeding 200*l.* per annum*: and makes sundry other provisions for payment of his debts and legacies, to the end that no part

A devise to A.'s three sons successively in tail male; remainder to all and every other son of A., without naming any estate; remainder for want of such issue to B., in [* 500] tail male: [the after-born sons of A. take an estate in tail male; *post*, 523.]

(q) See *Gulliver v. Ashby*, *post*, 607.

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of the estate might be sold, or the timber cut down, or the deer-park disparked. And Sir Samuel died 24th December, 1726.

At the making of the will, Charles Duckenfield had only three sons, Samuel, Charles, and John; but afterwards, and before the testator's decease, he had another son named William, born 25th March, 1725. John died a minor and without issue, 3d November, 1729; Samuel, 29th November, 1729; and Charles, 3d December, 1729. And William (afterwards Sir William, Baronet,) the only surviving issue of Charles Duckenfield, came of age 25th March, 1746, and, the same year, obtained an act of Parliament, 19 Geo. 2, to take the name and arms of Daniel. The 4th of September, 1756, Sir William Duckenfield Daniel suffered a recovery of the premises in the Court of Chester, the uses of which were declared to himself in fee; and by his will, dated 8th December, 1756, and republished 30th October, 1757, devised them to Dame Penelope, his wife, and her heirs, and died 11th January, 1758, without issue male, but leaving one daughter, Henrietta. *Sir William was himself, in right of his mother, a co-heir of Sir Samuel Daniel; and Sir Richard Brooke, the lessor of the plaintiff, was a devisee in trust of all the estates of Samuel Minshull, the other co-heir. Wherefore, this ejectment was brought to recover a moiety of the premises; and the sole question was, what estate passed to Sir William Duckenfield on the death of his three elder brothers, without issue male of their bodies.

Blackstone, for the plaintiff, argued, that he took only an estate for life; and he laid down these general principles:— 1. That devises are to be expounded according to the intent of the testator, without requiring any technical phrases, or formal arrangement of clauses. 2. That this intent must be collected from the whole will taken together, and not from detached parts of it. But, to prevent confusion from constructions merely conjectural, 3. This intent must not be collected from barely possible implications, but from such as are necessary, or at least highly probable. And therefore, 4. The words which shall disinherit an heir at law must not be ambiguous, but have a plain, apparent intent. And, lastly, that where an intent cannot be collected to the contrary, by express words, or by necessary or probable implications, there the will shall be expounded according to the letter, and the technical rules of law. And he insisted, that, from the whole will taken together, there appears no intent of the testator, (either express, or arising from necessary or probable implication), that Sir William should have a greater estate than for life; and therefore, as the words in their technical import convey only a life estate, (Co. Lit. 42), more shall not be given him, to the disinherison of the heir at law. The power of leasing, of jointuring, and the cautions taken to prevent waste, make it probable, that Sir Samuel never intended any thing more than an estate for life to any of the devisees specifically named in his will. Admit, it has been [*502] *frequently held, that these circumstances (occurring singly)

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shall not reduce a plain devise in tail into an estate for life. But *juncta jvant*; the more such circumstances, the greater is the probability. And though the probability is not so strong as to pull down the estates tail, that are already well and legally created in the former part of the will, yet it will be sufficient to prevent the erection of a new entail upon other supposed probabilities. It will rebut any other arguments to induce a belief, that he meant an estate tail where he has only expressed an estate for life. Though the Court will supply legal words to aid a testator's intention, it will not supply them to defeat it; or, even if dubious, to decide it in prejudice of an heir at law. If it be supposed, Sir Samuel meant an estate tail to the after-born sons of Charles Duckenfield; it must be either, 1. Because he has given what the law determines to be estates tail to the three devisees next preceding, and the three which succeed this devise, and his intent shall be supposed to be uniform. But this will not be contended to be a necessary implication in the strict legal sense; nor is it such a probable one as the law requires: since mere uniformity is not a reason sufficient to do violence to the words of a will. There is nothing absurd, unjust, or inconsistent, in giving one brother an estate tail, and another an estate for life. Can the Court declare, that a testator shall not be kinder to one man than another? Or that he had not, in fact, a greater kindness for those children of his niece whom he knew, than for those which were then unborn? Where a devise is to different persons by different expressions in different clauses of the will, we should rather conclude the intention was different, than that it was one and the same. *Beviston and Hussey*, Skinn. 385, 562: a devise to Henry, son of Thomas, and his heirs, and if he die before twenty-one, then to the next son of Thomas; and if Thomas had no son, then to Henry, the son of William, and his heirs: held, to be only an estate for life in the second son of Thomas, on the authority of *Middleton and Swain* (r), which is reported Skinn. 339; but more fully, Show. Parl. Cases, 207, *Swain and Fawkenor*: devise to seven younger children respectively, and *their heirs*, of seven shares in the New River; and, if any of them died under 21, the testator devises his share to the survivors, share and share alike. Upon the death of one of them under age, it was held, that the survivors took his share as tenants in common for life only, and not in fee: affirmed in *Dom. Proc.*, because adding the word "heirs" in the first clause, and omitting it in the second, shews the testator to have a different meaning in the first from what he had in the second.—2. It may be said, the words immediately following this devise, "And for want of such issue, then with remainder 'over,'" will raise an estate tail by implication. But, in all the variety of cases, where estates tail have been raised by these or similar words subjoined to a devise for life, the person, on failure of whose issue the next remainder is limited, hath

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(r) Or *Swain*, reported also in Comb. 201.

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always taken some estate in the preceding part of the will, on which the subsequent words shall operate by way of enlargement. But here Charles Duckenfield the father takes no estate at all, though the remainder be limited on failure of issue of his body. *Gardner and Sheldon*, Vaugh. 259. So a devise to the issue of B., and for want of such issue to C., gives the issue of B. only an estate for life; *Cook and Cook*, 2 Vern. 546 (s). "For want of such issue," refers grammatically to the issue last named before (t), which are all and every the sons of Charles Duckenfield: "For want of such issue," is therefore the same as saying, "and if Charles Duckenfield has no sons;" which brings it *in terminis* within the case of *Beviston and Hussey*, which I rely on, as in point upon both parts of the question. Supposing (for argument only) that it is proper to raise an estate-tail in these after-born sons, it cannot be done but by supplying other words. And what words is it proper to supply? Heirs of the body, or heirs-male of the body? Are they to be tenants in common with cross remainders? or joint-tenants? or to take successively, by seniority of age and priority of birth? Which of these words will you supply, and why one [* 504] set rather than another? *If therefore Sir William took only an estate for life, his recovery was void (v), and a moiety of the estate, at his death, devolved to the lessor of the plaintiff.

Harvey, for defendant, argued—That in all the modern cases, the general rule has been to effectuate the intent of the testator; and admitted the positions laid down by the plaintiff's counsel. He admitted also, that to persons unbiassed by legal knowledge, it would seem, that Sir Samuel Daniel meant only mere estates for life to the three eldest sons. But, as the law makes a construction of one to be estates tail, it will of the other also; for the meaning in both is the same. Or take it the other way; if the testator meant only an estate for life to the three eldest sons, then by devising to the after-born sons in different words, he must mean a different estate. By directing all the takers and their descendants to use the name and arms of Daniel, the testator intended to give estates to all the descendants; else the estate given is not equal in duration to the condition imposed upon it; *Robinson and Robinson*, King's Bench, 1756 (u): devise to Lancelot Hicks for life, and no longer, provided he takes the name of Robinson; and after, to such son as he shall have, who shall take the name of Robinson; and, in default of such issue, remainder over: held, an estate tail in Lancelot Hicks. Nothing need be supplied, to

(s) "For they shall take only as persons described."—And see *Goodright v. White*, post, 1010.

(t) See *Joas v. Legge*, Fearn, C. R. 376, 3 T. R. 488, n. (a); *Doe v. Perryn*, Id. 484, 491; *Doe v. Dacre*, 1 Bos. & P. 250.

(v) Inasmuch as the remainders over were vested. For if it could have been contended, that the words would give the

children of Sir William a fee as purchasers, such fee would be contingent, and the remainders over also contingent, and they would all have been barred by the recovery of the tenant for life: according to what is said in *Doe v. Holmes*, post, 777, and cases there cited.

(u) 1 Ld. Ken. 298, 1 Burr. 38; S. C. in *Canc.* 3 Atk. 736; 2 Ves. S. 225.

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make out the testator's meaning, but the word "descendants," or "male descendants." The words, "for want of such issue," will then have their effect; though, otherwise, "such issue," will easily mean, "for want of the same kind of issue, as before" prescribed, in case of the elder brothers." This is not the case of an heir-at-law, but strictly of remainder-men only; for there are three intervening remainders between this devise and the reversion. As to what kind of estate tail the after born sons, if more than one, would have taken; I answer, not a joint estate, but a sole one in regular succession, conformable to the testator's intent expressed in the three preceding devises.—

**Lomax and Holmden*, Hil. 1732, 3 Wms. 178, and afterwards [*505]
coram Lord *Hardwicke*, 1749 (w): devise to the first son of Caleb, and the heirs-male of his body, remainder to the second, third, fourth, and fifth sons of Caleb successively, without saying for what estate. Lord Chancellor inclined strongly, that this was an estate tail in all of them: but it went off on another point. *Humberston and Humberston*, 1 Wms. 333: devise of fifty life-estates to several Humberstons and their sons, as well unborn as born; Lord *Cowper* held, the unborn sons should take estates tail, and those that were in *esse* only life-estates. But if it cannot be argued from the intention, that the testator gave Sir William Duckenfield an estate tail, I submit, that, by the letter of the devise, he has given him an estate in fee-simple, by devising to him, "All my manors, &c. wherein I "have any estate;" which is equivalent to a devise of all my estate to A. B., which gives a fee-simple, if the testator were tenant in fee. And, in either case, judgment must be given for the defendant.

Blackstone, in reply, observed, that the determination in *Robinson and Robinson*, went clearly upon the words, *in default of such issue*, which overpowered the words, *and no longer*, in the devise to Lancelot Hicks. The condition of taking the name had no influence in that determination, it being repeated after every estate, whether for life or in tail. Besides, in fact, Sir William Duckenfield never took the name and arms of Daniel for his descendants, but for himself only. The bill came down from the Lords, to empower Sir William and the heirs-male of his body to take and use them. The Commons, in a second committee, struck out every clause that tended to suppose an estate-tail in Sir William, altered the title, and confined the name and arms to himself for life only. This, therefore, so far as it goes, is an argument rather against, than for the estate tail. *Lomax and Holmden* is questioned by the reporter himself; and Lord *Hardwicke*, in order to effectuate what he thought the testator's intent, had recourse to the astute reasoning of Sir **Joseph Jekyll*, and construed the second son to be the first, the eldest being dead without issue. Had he conceived, that the second devise ought to be conformable to the first, that alone would have solved the difficulty. In *Humber-*

Vide Journal
H. of C. May,
1746.

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ston's Case, the words, "in default of such issue," were held not to create an estate tail. Besides, Sir William was not an unborn son at the testator's death.

Uterius concilium.

[*S. C. Post*, 531.]

WESTON v. COULSON.

Where a sheriff is plaintiff, a *latitat* directed to himself is ill.

ACTION by a sheriff, against one of his bailiffs. Before appearance, the *Attorney-General* moved to set aside the proceedings, because the *latitat* was directed to the sheriff himself, and not to the coroners.

Morton argued, that this was only process, which the sheriff, though interested, might as well serve as any other man; but, when his partiality may be of material importance, as on a *venire, fieri facias*, &c.; there, it must be directed to an indifferent person. And he said, that, when a sheriff suffers a common recovery, the writ of entry is directed to himself, but the writ of seisin to the coroner.

But the Court held it was irregular, and set aside the proceedings without costs (x).

(x) *Com. Dig. Viscount* (E); *Vin Abr. Sheriff* (P); *Bac. Abr. Id.* (M).

BIDDLESON v. WHITEL.

S. C. 3 Burr. 1545.

No bail is requisite on error of a judgment in an action of debt on judgment.

LORD MANSFIELD delivered the opinion of all the Judges.—This was a writ of error, in an action of debt upon judgment. The question was, whether, under the statute 3 Jac. 1, c. 8 (y), bail ought to be put in upon this writ of error. The point had occurred in both this Court and that of Common Pleas, and had been differently settled by the two Courts. 10 Ann. *Goodwill* and *Goodwill* (x), King's Bench; that in error upon actions of debt brought upon a judgment, no bail was *required by the statute, as when brought on obligations, &c. But 2 Geo. 1, in Common Pleas, *Leaptrot* and *Atkinson*, it was held, that the contract is the foundation of all the actions that are brought for its non-execution; and that, where bail was required on the original action, it ought also to be given on error brought thereon. This made it necessary to refer the point to the twelve Judges, that an uniform rule of practice might obtain in both the Courts. And all the Judges are of opinion, that, where the action of debt is brought on a judgment, there, upon error brought, bail ought not to be required. And they ground themselves on these reasons: 1. That the original contract is drowned in the judgment; and that no implied contract arises between the parties from the judgment. *Nam judicium red-*

(y) Extended by 13 C. 2, st. 2, c. 2; (z) 10 Mod. 16, by the name of *Goodwill* & 17 C. 2, c. 8; 19 G. 3, c. 70, s. 5; *win v. Godwin*.
51 G. 3, c. 124, s. 3.

ditur in invitum. 2. The statute having enumerated debts of an inferior nature, it excludes those of a superior. 2 Rep. 46, Archbishop of *Canterbury's Case*. 3. The Case of *Taylor and Baker*, 3 Keb. 802, is direct in point, that no bail shall be given. The question is not what the Legislature should have done, but what it has done. And the statute ought not to be extended, in this case, beyond the letter; because actions of debt upon judgment ought not to be favoured, being for the most part odious and oppressive.

It was therefore ruled that no bail should be given(a).

(a) Recognized in *Tynder v. Watson*, Com. Dig. *Bail* (G 2)—*Costs* (B)—*Pleader* 3 Burr. 1566. See *Rafael v. Ferrelst*, post, (3 B 12); Bac. Ab. *Bail* (B 7). 1067; *Pulteney v. Townson*, post, 1227—

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v.
WHITEL.

Debt on judgment not to be favoured.

WILSON v. SMITH.

S. C. 3 Burr. 1550.

CASE reserved at the trial of an action on a policy of insurance, dated 16th February, 1760, at five guineas *per cent.*, on goods aboard the *Boscawen* from Lancaster to Rotterdam. In a printed *N. B.* at the bottom of the policy, "Corn and fish are warranted free from average, unless general, or the ship stranded: sugar, tobacco, and some other specific goods, free from average, under 5 *per cent.* (and all other *goods, under 3 *per cent.*) unless general, or the ship be stranded." The ship with a cargo of wheat belonging to the plaintiff sailed from Lancaster 21st February;—met with a violent storm 22d February;—was obliged to cut away her cable and anchors for the safety of the ship and cargo(b), and to put into Liverpool to refit; the expence of which refitting amounted to 38*l.* 15*s.* *per cent.* The hatches were not opened at Liverpool; but afterwards, at Rotterdam, upon unloading the wheat, it appeared that it had received damage by the storm to the amount of 56*l.* 19*s.* 8*d.* *per cent.* *Qu.* Whether the plaintiffs can, under these circumstances, recover in this action—over and above the 38*l.* 15*s.* *per cent.* for the refitting, which was not disputed.

Insurance free from average unless general, does not extend to the damage received by the goods in a storm.

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The Case was argued last Term, by *Dunning* for the plaintiff, and *Morton* for the defendant; and again this Term, by *Norton*, Attorney-General, for the plaintiff, and *Burland*, Sergeant, for the defendant.

For the plaintiff it was insisted, that the clause was first introduced into policies in 1749, because the underwriters (being frequently called upon to make good very trivial losses) did not care to insure a perishable commodity without a large pre-

(b) If the master of a vessel, compelled by necessity, cut away and abandon his masts, sails or cables to lighten and preserve the ship, such loss becomes the subject of general average, and their value must be made good by contribution. But if sails are blown away or cables broken by the violence of the wind, the owner

alone must bear the loss; Abbott on Shipping, 860 (ed. 1812). See *Birkley v. Presgrave*, 1 East, 220; *Covington v. Roberts*, 2 N. R. 378; *Power v. Whitmore*, 4 M. & S. 141; *Taylor v. Curtis*, 6 Taunt. 608, where all the authorities on this point are referred to; S. C. 2 Marsh, 309.

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mium, and without knowing what they were, and whither bound; the discovery of which was frequently inconvenient to the merchant; and therefore this *N. B.* was added, to give the merchant the benefit of insurance. That nothing is intended to be discharged thereby, but losses arising from the perishable nature of the commodity. Else it will be better for underwriters to insure perishable commodities than bale goods, in case general average be understood in the legal sense of contribution, to which ship, cargo, and freight are all proportionably liable; for they are answerable for bale goods if they receive damage above 3 *per cent.*, but not at all for corn or fish; and as the same premium is paid for all, the risk ought to be the same. The true construction therefore is, that the insurer shall be free from average (*i. e.* partial loss) unless there be a general average (*i. e.* a contribution raised upon the whole cargo); because if the ship be in such a situation, as that a general average shall arise, or if the ship be stranded; then it is certain, that some loss must accrue from the distress and danger of the ship: and as it cannot be ascertained how much arose from the nature of the commodity, and how much from the external accident, in that case the insurer shall pay for the whole of the loss.

For the defendant it was urged, that general average has a known signification in law, viz. that contribution, which every parcel of goods pays for the damage done in securing the whole. The insurer is bound by his contract to provide against nothing but such a general average, or a total loss. It would be absurd, that, if by the loss of a cable or the like, the goods should pay 6*d.* *per cent.* average, the insurer should be liable to 50*l.* *per cent.* arising from the nature of the commodity. The rational construction is, that the insurer shall make good no other loss, but what arises from a general contribution in respect to corn and fish;—and no loss under 3 or 5 *per cent.* in respect to other goods, unless in case of such general contribution. Or, in case the ship be stranded, then he shall bear all losses the insured shall suffer, because the insured has then a right to abandon, and give notice to the insurer.

Afterwards Lord MANSFIELD, C. J., delivered the opinion of the Court. Nothing is more inaccurately penned than the form of our policies of insurance. One proof of which, among many others is, that the words used therein have often very different significations. This very word average sometimes signifies loss, and sometimes contribution. And it did so in Spelman's time; See his Glossary, *tit. Averagium*. But whichever sense it is here used in, the plaintiff cannot recover. If it signifies loss, then here there is no loss at all; only the commodity is damaged, and depreciated in value. If it signifies contribution, then the insurer shall be free from it, unless where the contribution is general. Therefore we are all clear, that judgment must be for the defendant (c).

(c) This *N. B.* or memorandum, which is now always annexed to policies, has given rise to many decisions; and from the consideration of them the following

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principles may be collected;—that the insurers are not liable for any loss arising from the perishable nature of the commodities therein enumerated, or from any damage they may have sustained, unless such loss be in itself the subject of general average, or unless the ship be stranded, or there be a total loss:—and that the circumstance of a general average having taken place as to other goods, or to part of the commodities themselves, or to the ship, as in the principal case, will not make them liable for a partial loss. The cases rather disagree as to what shall be considered a *total* loss. Where a cargo of corn was so much damaged on arrival at the port of delivery as to be worth less than the freight, the loss was considered not to be total, and as it was not a general average, and the ship had not been stranded, the underwriters were held not to be liable; *Mason v. Skurray*, Parks. Ins. 191 (ed. 1817). Marsh. Ins. 226 (ed. 1808). So where a ship sailed laden with fish, a quantity of which was hove overboard for the preservation of the ship and cargo, which of course was a general average, and afterwards she was obliged to put into Lisbon though bound to Figara, and it was found by the board of health there, that the remainder was rendered of no value; yet the Court held that as the articles *specifically* remained, it could not be considered as a *total* loss, and therefore that the underwriters were only liable for the general average on the cargo, and the particular average on the ship; *Cocking v. Fraser*, Park's Ins. 181, Marsh. Ins. 227. The same principle was adopted in *M'Andrews v. Vaughan*, Park's Ins. 185, Marsh. Ins. 232. However Lord Kenyon said, alluding to the case of *Cocking v. Fraser*, he could not subscribe to the opinion there given, that if the commodity specifically remain, the underwriter is discharged; 7 T. R. 222. And where fruit was so much damaged by sea water, that the government prohibited the landing of it, and it was necessarily thrown overboard, and the ship also was so much damaged as to be unable to proceed and was necessarily sold, the insured recovered as for a total loss. There *Heath, J.*, said, "As the cargo was necessarily thrown overboard, the case does

not fall within the exception in the memorandum, and is not governed by the Case of *Cocking v. Fraser*. Had it been the same as that case, it would have been necessary for us to consider, how far that case has been impeached by the observations of Ld. Kenyon;" *Dyson v. Rowcroft*, 3 Bos. & P. 474. See also *Anderson v. Roy. Es. Ass. Comp.* 7 East, 38; *Thompson v. Roy. Es. Ass. Comp.* 16 East, 214. On an insurance on rice "free of particular average," until landed at L., the ship was wrecked within the limits of the port of L., and the rice was so much damaged as not to produce sufficient to pay the freight; this was held not to be a total loss, and that the underwriters were discharged; *Glennie v. London Ass. Comp.*, 2 M. & S. 371. Note, the two Insurance Companies omit the words "unless the ship be stranded," in their policies, and therefore are only liable for general average or in case of a total loss: See *Castillon v. London Ass. Comp.*, cited in 3 Burr. 1553.

It is now settled by a case which underwent great discussion, that if a ship be *stranded*, the insurer is liable for any partial loss, in any of the excepted articles, though it did not arise from the stranding, but from some other cause. Lord Kenyon: "The words of this policy are in general terms, including all cases; then comes this memorandum, 'corn, fish, salt, fruit, flour and seed, warranted free from average unless general, or the ship be stranded.' This therefore lets in a general average, and I do not know how to construe the words grammatically, but by saying, that if the ship be stranded, then it destroys the exception, and lets in the general words of the policy;" *Burnett v. Kensington*, 7 T. R. 210. The same point had been determined in *Booring v. Elmelle*, 7 T. R. 216. (a); *Nesbitt v. Lushington*, 4 T. R. 783.

As to what shall be considered a *stranding*, see *Dobson v. Bolton*, Park's Ins. 177, Marsh. Ins. 239; *Baring v. Henkle*, Id. 240; *M'Dougle v. Roy. Es. Ass.* 4 Camp. 283, 1 Stark. 130, 4 M. & S. 503; *Corruthers v. Sydebotham*, 4 M. & S. 77; *Hearne v. Edmunds*, 1 Brod. & B. 388, 4 B. Mo. 15; *Rayner v. Godmond*, 5 B. & A. 225; *Barrow v. Bell*, 4 B. & C. 736, 6 D. & R. 244.

THE KING v. D'EON.

S. C. 3 Burr. 1513.

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THE Attorney-General, by command of the Crown, had filed an information against the defendant, Charles Genevieve Louis Augustus Andrew Timothy D'Eon de Beaumont, a French gentleman, who was originally secretary to the Duke de Nivernois, when ambassador here from France, and at his recall was made plenipotentiary, and charged with the affairs of that

Trial not put off on affidavit of the absence of material witnesses, when the case is suspicious, and the witnesses are so-

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reigners, never
likely to return
to England.

Process on in-
formations.

Court, till the arrival of the Count de Guerchy the present ambassador. Soon after which a warm dispute broke out between the Count and M. D'Eon; notes and contre-notes were published on both sides, and at length, in April last, M. D'Eon published a large quarto volume, highly abusing the Count, and charging him in direct terms with forging his, D'Eon's, letters of recall. For which (as a libel) the present information was filed; the subpoena being served on the 12th of April, and returnable the 9th of May. By the practice of the Court, the defendant could not be brought in by any compulsory process, till the 4th of June; on which day he thought proper to appear; and the information was filed on the 8th of June, and a copy then delivered to him. He could not be forced to plead till the 29th of June, when he pleaded the general issue, and notice of trial was at the same time given for the 9th of July. And now, on the 30th June, *Morton* moved to put off the trial till the next Term, on the defendant's affidavit of the absence of four material witnesses, whom he named, and swore to be sent abroad at the instigation of Count Guerchy, but who (he believed) would come over in next Michaelmas Term.

LORD MANSFIELD, C. J.—Is it possible, that the evidence sworn to be abroad can be material in this case? Remember the Case of the *King* and *Radcliffe* (d). There could be only a single question, Whether Radcliffe was, or was not, the person formerly attainted. The Court told him, if he would swear the negative, he should have all possible indulgence, and [they would] put off his trial, [he] having sworn to the absence of a material witness. But he refused, and the trial was brought on *instantly*. Let *the counsel for the defendant consider, whether the facts laid in the information can admit of any justification. If not, the whole results to the single question of publication, which is a fact wholly within the defendant's knowledge. However, take a rule to shew cause, on Wednesday the 4th of July.

On that day M. D'Eon swore a supplemental affidavit, that, on conference with his counsel, they had assured him, that the facts, which his witnesses were to prove, would be material on his defence; and therefore he swears "to his belief;" and that the gentlemen had been sent out of England, at the instance of Count Guerchy, on account of their friendship with D'Eon, and, since they had been in France, were enjoined not to open their lips about this affair.

The *Attorney-General*, *Solicitor-General*, and *Wallace*, shewed for cause, that the new affidavit is a fresh libel on the Count de Guerchy. That, in December last, D'Eon set up a press in his own house; had printed off the libel, entitled *Memoires et Negotiations*, &c. by the end of March, and published it the beginning of April. If therefore the witnesses were sent off by Count Guerchy to stifle their evidence, (as was insinuated, though not positively sworn to), it must be since the publication: whereas in fact they left England in Novem-

ber last about their own affairs. And we have the affidavit of the Count's secretary, that they were not sent away by the Count. They are now in the King of France's actual, military, service. Is it probable he will send them over in next Michaelmas Term, merely to give their evidence in behalf of D'Eon? Can they, who left England in November, be material evidences in respect to the publishing of a libel in the April following? If they can be supposed to prove any thing, it must only be the truth of some of the facts alleged, which the defendant may weakly suppose to be a justification; but that cannot be given in evidence (e). It is not sworn that the witnesses are likely to return, or that he has used any endeavours to bring them over, though he has known of this prosecution ever since the middle of April. Trials might be put off *ad Græcas kalendas*, if such loose affidavits are admitted. And (*per De Grey*, Solicitor-General), the only question is, whether the defendant did print and publish. In *Radcliffe's Case* (in order to obtain a like favour from the Court) the Court required him to say, he was not the person. Why will not M. D'Eon now say, he did not print and publish?

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Morton and *Ashhurst*, in support of the rule, observed, that, if the defendant be now convicted, he cannot be brought to judgment till Michaelmas Term;—that the indulgence asked for will make only eight days difference in that respect. That M. D'Eon is entitled to the same justice and indulgence as every subject of this kingdom. He is in the usual course of the Court, which, on a general affidavit of the absence of any material witness, will always put off the trial, for once at least. If the application is repeated, without disclosing some special circumstances, it is then indeed looked upon as an artifice to evade any trial. But if, as is suggested, the King of France will not suffer his subjects to come over to give evidence on behalf of D'Eon, the Justice of England ought to put off the trial indefinitely, even *ad Græcas kalendas*. In the *King* and *Belinda Williams*, where an information *ex officio* was filed against her for a cheat in pretending to be an officer's widow, to whom it was alleged she was never married; she swore to the absence of a material witness in Scotland, who refused to come, and was out of the reach of any process from this Court. The Court put off the trial, and said; "Unless the prosecutors would consent to let a commission go into Scotland to examine the absent witness, they would put off the trial from time to time" (f). To avoid the imputation of collusion, the defend-

Trial put off till a commission should go to examine a material witness, who was out of England, and refused to attend the trial.

(e) *R. v. Baker*, Bull. N. P. 9; 1 Hawk. P. C. c. 73, s. 6; 4 Bac. Abr. *Libel*, (A) 5, p. 455, *acc.*

(f) *S. C.* cited by Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowp. 174; *S. P. Furlly v. Newnham*, 2 Doug. 419. So where on an information the defendant applied to put off the trial, the Court refused to grant the application, unless he would consent to the examination of a witness for the Crown upon interrogatories;

and in that case it was held, that depositions so taken might be read in a criminal case; *R. v. Morpew*, 2 M. & S. 602. The Court of C. P., in one case, refused, by putting off the trial, or other indirect means, to compel a plaintiff to consent to a commission for the examination of witnesses in Scotland; *Calland v. Vaughan*, 1 Bos. & P. 210; see also *Att. Gen. v. Larogity*, 3 Price, 231.

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ant has sworn, in the common form, that he did not send the witnesses away, and that Guerchy did. If Guerchy did not, why does he not swear it himself? Does he think himself too great a man? He appears here in no other light, than that of a subject of England prosecuting for a misdemeanor, and appealing to the justice of the country. Long before November, books were published in respect to this dispute; I will not say by whom; for, till the course of the Court is avowedly altered, I will not, on such a motion, disclose the merits of my client's defence. Guerchy might send the men abroad to prevent them from giving evidence against the facts which were alleged against D'Eon by his *antagonist. D'Eon never thought, nor was told, that the truth of the facts, alleged in a libel, might be given in evidence. He was told, and has sworn it, that, if the gentlemen could give the evidence he said they would, it would be very material: perhaps not in justification, but in extenuation. But, in what manner material, the Court will not expect us to disclose. No delay is imputable to D'Eon: he appeared in time, and was not contumacious. Is he to outrun the zeal of the prosecutor, and appear before the law commands him, or else not be entitled to common indulgence? I did not expect to have heard Mr. *Radcliffe's Case* applied to the present case. That was an instantaneous proceeding, in the nature of an inquest of office: and therefore (says Mr. Justice *Foster*) could not be put off, unless upon good cause. Whoever reads that case attentively will observe, that Mr. Justice *Foster* himself seems, in some of his days, to have wished that the trial had been then put off (g).

YATES, J.—In my juvenile days, I used to think that was a hard case. I have lived to see reasons why I think it a right determination. It was a matter entirely in his own knowledge.

LORD MANSFIELD, C. J.—I don't believe Mr. Justice *Foster* had any doubts about the propriety of bringing on the trial. One thing he had mistaken, and therefore doubted about. He thought the Court had refused to let the prisoner plead the act of indemnity, after he had pleaded in chief. But I set him right in that particular before he published: and I believe he corrected it. The act of indemnity excepted all who had broke prison, which, we were prepared to shew, Mr. *Radcliffe* had done: on notice of which, his counsel did not insist on their plea.

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Morton.—I hope that case shall never be applied as a precedent to make a defendant disclose and anticipate his defence, in order to obtain a common favour. What our defence is, I will not, for the sake of precedent, disclose; but if nothing should be left to a jury in the case of libels but the mere publication, I am sure that much time has been lately

(g) *Fost. Cr. Law*, 40; *ante*, 3, *S. C.* Lord *Kensyon*, observing upon that case, said; "How far that case was relied at the time, the public opinion of it has since

shewn. It has never since been considered as a precedent, or at all acted under;" in *Duberly v. Gunning*, *Peake's N. P. C.* 97.

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mispent before your Lordship. (Alluding to *Wilkes's Case* (h) for publishing the North Briton, No. 45, in which the tendency and nature of the libel was amply discussed at the trial.)

Lord MANSFIELD, C. J.—Informations *ex officio* are personally the King's prosecutions. No man is there to be considered in the light of a promoter or private prosecutor. No crime is so great, no proceedings so instantaneous, but that, upon sufficient grounds, the trial may be put off. Mr. *Radcliffe's Case* did not proceed upon the instantaneous nature of the trial. If the usual form of the affidavit is observed, and there is no special ground of suspicion, the rule goes of course. But if there be such ground, it is refused unless the party will go into farther and minuter circumstances (i): or, if it appears that there is an affected delay, the rule is also then refused. Three things are necessary to put off a trial.—1. That the witness is really material (k), and appears to the Court so to be. I have often known it refused unless the party will say to what point he means to examine him. 2. That the party who applies has been guilty of no neglect (l). 3. That the witness can be had at the time to which the trial is deferred. Mr. *Radcliffe's Case* is now out of the question. For, 1. It appears most clearly now, that they cannot be material evidences. They went abroad in November, and therefore cannot be material evidences to the publication in March, in England. As to any circumstances of alleviation, if proper to be considered before the judgment, he may lay them before the Court by affidavit (m). The defendant insinuates that they were sent abroad by Count Guerchy to prevent their giving of testimony. But that is impossible, from the difference of dates and times. He swears also, that they have orders not to open *their lips about the affair between him and Guerchy. That also is impossible. The affair must mean this prosecution, or means nothing to the present purpose: which was commenced long after they were sent or went abroad. 2. The defendant had notice of this prosecution on the 12th of April. It appears in the state trials (*passim*), that notice is held to be given by the warrant of commitment. In all that time no endeavour has

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(h) 4 Burr. 2527, 19 How. St. Tr. 1075.

(i) So where writs of *mandamus* issued under a particular statute to examine witnesses abroad, the Court would not postpone the trial till the return of the writs, unless the defendant laid before the Court such special grounds by affidavit as might induce them to think, that the witnesses sought to be examined were material to his defence; *R. v. Jones*, 8 East, 31, where Lord *Ellenborough* approves of the rule laid down in the text; *Id.* 37. It also there appears, that the common form of the affidavit is to mention the persons on whose account the trial is sought to be put off, by name, and that the defendant (or prisoner) "is advised and believes that

their evidence will be material to him upon the trial." As to putting off the trial in civil cases, see *Lord v. Cooke*, ante, 436.

(k) In *R. v. Jones*, 8 East, 33, the defendant swore, "that he was advised and believed, that their evidence would be material for him upon the trial:" but Lord *Ellenborough* intimated, that the affidavit was not sufficiently full; omitting, as it did, to shew in what respect the evidence of the witnesses was material. *S. P. Day v. Samson*, Barnes, 448; *Corbyn v. Dawson*, 2 Tidd's Pr. 817, (ed. 1821).

(l) *Saunders v. Pitman*, 1 Bos. & P. 33, *acc.*

(m) See *R. v. Burdett*, 4 B. & A. 314, 319.

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been made to bring these gentlemen over. 3. They are all subjects of France. The presumption therefore is, (unless you shew a special ground to the contrary), that they will not come back to England. The presumption is otherwise in British subjects; that they will return to their own native soil and domicile. Two are in the army, and cannot come without special permission. In *Steel's Case*, indicted for perjury, there was a full affidavit, that one Matthews, at Guadaloupe, was a material witness.—The Court refused to put off the trial: and when it came on it was manifest, that Matthews could not have been at all a witness to any thing. In the *King and Luckup*, the Court would not put off the trial, till the defendant shewed a special ground for believing that his witnesses would come over, and came into terms of stopping all actions in the Common Pleas. In the Case of *Belinda Williams*, the sole question was, whether married or not married. All the witnesses were in Scotland. By consent, as this was a civil fact, it went down to be tried by commission, as if in a civil action.

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WILMOT, J.—The rule is the same in criminal and civil cases, and whether the information is granted by the Court, or filed by the Attorney-General. In common cases it has been sufficient to swear generally to the absence of material witnesses; though I have always thought the rule too loose. But even in a common action, if the witnesses are foreigners, *the general affidavit will not be sufficient. The presumption is, that natives of Great Britain will return to it, and that foreigners will not. As to the insinuation that M. Guerchy sent the men abroad to take off their evidence, were the fact well proved, I should think it a reason to put off the trial for ever. But it is not proved, nor is even a belief of it sworn to. They went abroad before the book began to be printed. Impossible, therefore, that the insinuation should be true. Where there is *evidentia rei* against even a positive oath, that the absent witnesses are material, the Court will not put off the trial; especially as no pains have been taken, no endeavours used, to bring them over.

YATES, J.—Whatever indulgence the law gives to defendants in civil cases, it ought, *a fortiori*, to give in criminal. In both the view is to obtain justice. Whether the trial be accelerated or retarded, the view is the same. Two rules are necessary to be observed:—1. The evidence must be material: 2. That it may be attainable. 1. The Court will not drive the defendant to disclose what the evidence is;—but though he swears the man a material witness, that oath is not conclusive. If the other side can shew it impossible; as if the witness be the husband or wife of the party, or has been abroad seven years, and the cause of action arose last year, this will counterbalance his oath. But in the present case there is no occasion to consider the materiality; because, 2. The presumption is, that the evidence cannot be obtained, and the defendant has shewn no endeavours to bring the witnesses over.

Rule discharged, *absente* DENNISON, J.

N. B. On the 9th of July the defendant was tried, and, after proving the Duke of Nivernois's character and recall, M. D'Eon's station, character, and recall, and the Count de Guerchy's present character as ambassador; that D'Eon set up a press in his own house, printed, published, and sold the books; and, upon reading to the jury the most exceptionable passage, *he was convicted on the information; no counsel appearing in his defence. Mr. *Attorney* and *Solicitor-General*, *Blackstone*, *Clayton*, and *Wallace*, of counsel for the Crown. After which, Lord MANSFIELD observed to M. Mechel, the Prussian, and other foreign ambassadors, then attending the Court, that the laws of England paid as high a regard to the function of ambassadors, and would equally protect them from all insults, as well on their reputation as their persons or property, as the laws of any other country. M. D'Eon, on being denied a longer day, thought proper to make no defence. Otherwise it was expected he might have challenged the array, for want of jurors *de medietate lingue*. But it was conceived such challenge would have been too late, unless he had prayed such jury by a suggestion on the record, that he was a foreigner, at the time of awarding the *venire*. For this see Staundford's P. C. l. 3, c. 7; Dyer, 144, 357; Co. Litt. 157 b; Cro. Eliz. 869; 1 Keb. 547 (n).

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(n) See also 2 Hale, H. P. C. c. 36, p. 271; 2 Hawk. P. C. c. 43, s. 40; 3 Bac. Abr. *Jury*, (E), 8; 4 Bla. Comm. 352.

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WALKER v. PERKINS, Administrator.

& C. 3 Burr. 1568.

DEBT on bond for 600*l.* Defendant prays oyer of the condition; which recited, that the intestate, William Perkins, and Mary Walker, the plaintiff, having contracted a love and value for each other, had agreed *to live together on the following terms:—that he should find her with board, lodging, clothes, and a servant to attend her; and, if he happened to die in her life-time, or should refuse to live with her, he should pay her an annuity of 60*l.* *per annum*: and that, if she left him, or kept company with any other man, he should not be obliged to pay her the annuity, or to find her in board, &c. The condition of the bond was therefore for the performance of this agreement. Whereupon the defendant pleaded, that this bond was given for an unlawful consideration, that of living together in a state of fornication, and was therefore void in law. Plaintiff replied, that she, being a virgin, was seduced by the said Perkins; and that, for making a provision for her, and as a compensation for her chastity, he gave her the said bond. To

Bond for cohabitation with a woman seduced by the obligor, [*518] and for a maintenance after his death, void in law.

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which the defendant demurred in law, and assigned several objections in point of pleading, which were waived on the argument, by

Wedderburn, for the defendant, who insisted, that on the face of the bond it appeared to be an illegal consideration, and therefore the bond void.

Blackstone, for the plaintiff, argued, that the setting aside such bonds was as much an encouragement to seduction in one sex, as establishing them would be to incontinence in the other; and that seduction is the more odious crime. That the condition in the bond was twofold; 1st, To engage her to live on with him in a state of debauchery, which is clearly immoral, and therefore contrary to law. 2d, To make a provision for her in case of his death; which, as she was debauched by Perkins, is clearly a good consideration, within the Cases of *Lady Annandale*, 2 P. Wms. 432 (o); *Cray and Rooke*, Forrester, 153, &c. That if a bond be conditioned to perform two things, one contrary to law, and the other consistent with law, the bond shall be good as to the latter, and only void as to the former. That if the bond had been put in suit for not continuing to live together, the plaintiff could not have recovered; but being now sued on the virtuous part of the contract, to recover a maintenance after the obligor's death, it was legal.

[*519] *And in support of this doctrine, he cited *Chesman and Nainby*, Lord Raym. 1456, Stra. 739, as fully in point.

But *per Cur'*.—The consequences drawn would be just, did not the foundation fail in point of fact. Here is no virtuous part in the contract: all is calculated for the purposes of prostitution. And *per WILMOT, J.*—Instead of *præmium pudicitiae*, this is *pretium impudicitiae*. Therefore, *per tot. Cur'*, (*absente* DENNISON, J., throughout the whole Term),

Judgment for the defendant (p).

(o) *S. C.* 3 Bro. P. C. 445, or 1 Bro. P. C. 350 (2d ed.).

(p) As to bonds and deeds, the distinction seems to be, that where the bond or deed appears, either on the face of it, or by evidence, to have been given with a view to procure or continue an illicit connection, then it is void, being *præmium impudicitiae*; but where it is given, not with that intent, after cohabitation, even to a woman of previous loose character, but more especially to a woman seduced by the obligor or grantor, being in that case *præmium pudicitiae*, it is valid: *Lady Annandale's Ca.*, cited in the text. So a voluntary bond, given by a person to a common woman after he had kept her two years, was not relieved against, upon a bill brought by the executor of the obligor. There *Ld. Camden, C.*, observed, "The cases, which have been determined against securities given to common prostitutes, went upon the circumstance of the securities being given previous to the cohabitation; a consideration, which being *surpis* in its na-

ture, the Court has relieved against them. There is no principle in equity which says a man may not give a voluntary bond to a common prostitute; it would be going but a little further to say, he could not give her money, without her being liable to be called upon for it;" *Hill v. Spencer*, Amb. 641. "No doubt a bond would be void, where it expresses the consideration of *future* cohabitation;" *per Ld. Loughborough, C.*, in *Franco v. Bolton*, 3 Ves. Jun. 368, where the cases on this point are collected; there the counsel said, *arguendo*, "The principles upon which the Court acts are stated in a variety of cases, which all go pointedly to this distinction, that if there has been this sort of cohabitation, and the man chooses voluntarily to give a bond, without any reference to a continuation of that intercourse, it is undoubtedly good; more so, if he was the author of her ruin: but if she has been a person living in adultery with others, and she proposes to go and live with A. upon consideration of such a bond, the cases are all uniform, that this

Court will order it to be given up." Which two last cited cases were confirmed in *Gray v. Mathias*, 5 Ves. Jun. 286, where a voluntary bond given during cohabitation to a woman, previously of a very loose life, was considered unimpeached; but another given afterwards, expressly securing a continuance of the connexion, was considered void at law *ex turpi causa*. *Clarke v. Periam*, 2 Atk. 333, 337, *semb. contra*; but there the bond was cancelled by consent of parties. So in *Ex parte Ward*, cited in *Ex parte Mumford*, 15 Ves. Jun. 290, *Ld. Camden* held, that upon a bond or a bill of exchange, given as a compensation for the injury, not as the price of a future illicit connexion, an action might be maintained. So where one pretended to convey an estate (in Eutopia) to a woman as *præsum pudoris*, and in fact there was no such estate, *L. C. B. Pengelly* ordered so much to be conveyed out of the best part of his estate; *Cary v. Stafford*, Ambl. 520. So a bond given in consideration that the obligee would marry a woman who had cohabited many years with the obligor, was held good in *Ex parte Cotterell*, Cowp. 742. And where the condition of the bond was "that in consideration of cohabitation had, &c." on demurrer the bond was held good. *Clive, J.*—"I am in a Court of common law, and not in an Ecclesiastical Court: if a man has lived with a girl, and

afterwards gives her a bond, it is good;" *Turner v. Vaughan*, 2 Wils. 339. But where a young woman was seduced by a married man, *knowing him to be married* at the time of her seduction, a bill brought by her for payment of an annuity was dismissed: but without costs; *Priest v. Parrot*, 2 Ves. S. 160; *S. P. Mathews v. —*, 1 Madd. 558; *Lady Car's Ca.* 3 P. Wms. 339; *Robinson v. Gee*, 1 Ves. S. 254, where a husband had assigned his wife to the obligor, with covenants for quiet enjoyment and further assurance. See also *Kaye v. Moore*, 1 Sim. 3 St. 61, 2 Sim. & St. 260.

But past cohabitation is not a sufficient consideration to support an *assumpsit*. *Per Cur.*—"It is not averred, that the defendant was the seducer, and there is no authority to shew, that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited are distinguishable from this, because they are all cases of deeds; and it is a very different question, whether a consideration be sufficiently good to maintain a promise, and whether it be so illegal as to make the deed, which required no consideration, void;" *Binnington v. Wallis*, 4 B. & A. 650. See also *Robinson v. Car*, 9 Mod. 263; and *Gibson v. Dickie*, 3 M. & S. 463.

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DENN, on Demise of EDWARD SATTERTHWAITE v. CHARLES SATTERTHWAITE.

CASE reserved from Lancaster Assizes, on ejectment. The premises were a customary estate of inheritance, descendible from ancestor to heir according to the custom of the manor; and, by the custom, all tenements are devisable by will in writing without surrender. Old Clement Satterthwaite, being admitted tenant in fee, by will, 27th November, 1738, devised the premises to William Satterthwaite, his fourth son; for the use of William Satterthwaite, son of the said William, for his maintenance and education, till he attained the age of twenty-one years; after which, he devised the same to William Satterthwaite, the grandson, and his heirs. William, the son of Clement, entered and was admitted. William, the grandson, died before twenty-one, unmarried; and the defendant is his brother and heir at law. Clement, the eldest son and heir of the devisor, died after William, the grandson, leaving Edward, his next brother and heir at law; who, 14th May, 1761, devised all his customary estates to his nephew, Edward Satterthwaite, the lessor of the plaintiff, in fee. Neither Clement, the son, nor Edward, his brother, were ever admitted tenants, or were in possession of the rents and profits; and there is no instance of devising customary estates in this manner, before admittance.

Devise to A. for the use of B. till B. attains the age of twenty-one, and then to B. in fee; the fee vests immediately in B.

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Qu. 1st. As William, the grandson, died before twenty-one, whether the premisses descended to his heir at law? If not,

*2d. As Edward, the son of Clement, was never admitted, whether the premisses passed by his will?

Blackstone, for the plaintiff, admitted, that (though in *Gates and Haliwell*, 1 Leon. 101, it is held, that, on a devise to A. till B. attains the age of twenty-two, and then to B. in fee, the inheritance descends in the *interim* to the heir at law, yet) all the subsequent cases (*q*), from *Boraston's*, 3 Co. 19, to the present time, are so exceeding strong, that in such a case the fee vests in B. immediately; that unless the present case can be distinguished from those, it would be even indecent to argue it. And the only distinction he could see was, that in all the former cases, the first devise, *quousque*, has been to a third person, and for the benefit of third persons; creditors, widows, younger children, &c.; and then, as the testator has made no other disposition of the fee, but by giving it to the remainder-man, the law vests it immediately, though to be enjoyed *in futuro*: but in the present case, as the precedent estate is given to the father for the use and benefit of his son till twenty-one, and after his attainer of that age, then to the son in fee, it should seem that the intent of the testator was, that he should not have the fee till after he has attained that age, but that the fee descended in the interim to the testator's heir at law. This distinction seems warranted by the doctrine of *North, C. J.*, in *Taylor and Biddal*, 2 Mod. 289; "testator devised to Elizabeth, his sister and heir, till her son attained twenty-one; and then to the son in fee. Held, that the fee vests in the son immediately; because the testator could never intend the inheritance should vest in that person to whom he had devised the term."—Now in this case, the term is in effect devised to the grandson; and therefore, according to this reasoning, he shall not, during the term, have the fee.

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Clayton, for the defendant, cited *Hayward* and *White* (*r*), Hil. 30 Geo. 2, B. R.: devise to trustees and their heirs, in trust to pay the profits for the education of John and Thomas Hayward during their minority; and when they attain the age of twenty-one, then to the use of them and their heirs. The Court held, that the will passed an immediate interest to the brothers, and the trustees are only as guardians during their minority. The interest is vested, not contingent; and to take effect in possession, when of age.

And the Court was clear, that in the case at bar, William, the father, was only in the nature of a guardian to his son; and that the fee simple vested instantly in William, the son (*s*):

(*q*) Which are collected in *Fearne's C. R.* 241, *et seq.*; *Vin. Abr. Devise*, (N. b); *Com. Dig. Id.* (N. 18).

(*r*) Or *Goodtitle* dem. *Hayward v. White*, 2 Burr. 228, 1 Lord Kenyon, 506.

(*s*) So in a devise to trustees till A. shall

attain the age of twenty-four, and when he shall attain that age, to him in fee, A. was held to take a vested interest, which descended to his heirs upon his dying before twenty-four. *Ld. Kenyon*,—"The words *then* and *when* only denote the time when

wherefore the second point was not argued, and there was judgment for the defendant, viz. That the plaintiff be nonsuited.

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the remainder shall take effect in possession." *Ashhurst, J.*—"Had the deviser used these words, 'If A. shall attain the age of twenty-four,' that would have made it a condition precedent, and no interest would have vested in him unless he had attained that age. But here the devisee's estate was to take effect in possession, when he should attain the age of twenty-four. And this is like the case of

a legacy to be paid when the party attains the age of twenty-one; that is a vested legacy: but if the legacy be to be paid if the legatee attain the age of twenty-one, it is not vested;" *Doe v. Lea*, 3 T. R. 41, (see 1 P. Wms. 170; Willcs, 338); *S. P. Warter v. Warter*, 2 Brod. & B. 349, and see *Machin v. Reynolds*, 3 Brod. & B. 121.

EVANS ON DEMISE OF BROOKE v. ASTLEY.

S. C. Ante, 499.

THIS case was again argued by Serjeant *Hewitt* for the plaintiff, and *Norton*, Attorney-General, for the defendant; after which the Court gave judgment.

LORD MANSFIELD, C. J.—The reason of the multiplicity and seeming disagreement of the cases in the old books, concerning what words shall create an estate tail, and what an estate for life, in a will, has arisen, not so much from endeavouring to follow the intent of the testator, as from adhering to an old rule of law, that the ancestor cannot take a mere estate for life, and, in the same deed, an estate be given to his heirs as purchasers. The reason of this rule was founded in feudal tenure (t). For otherwise the lord, on the death of the ancestor, would be defrauded of his feudal profits. But since these tenures have been taken away, the Courts have indeed followed the rule of law where the case was plainly and directly within it, but have departed out of it wherever the intent of the testator was clearly against it. This has occasioned the variety. The true construction of the testator's intent is to be collected from his will, taking in the nature of the thing devised, and the relations the persons stand in to him. *The plaintiff claims as right heir to the testator, to whom the last remainder is limited by the will. He therefore claims under the will: and the same construction must now be used, as if William Hulton, or any other intermediate remainder-man, had been living, and had brought this action. Therefore all arguments are out of the case which have said, that heirs at law are to be favoured, and that nothing but necessary implications can disinherit them (v). No doubt upon this question could have entered into the head of any plain man unused to legal niceties. What must be the construction of this devise, to favour the plaintiff's claim? Either, 1st, That it is void for uncertainty; or, 2dly, That the after-born sons took estates for life as joint-

A devise to the three sons of A. in tail male successively; remainder to all and every the after-born sons of A., without naming any estate; remainder, for want of such issue, to B. in tail male: the after-born sons of A. take an estate in tail male.

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(t) *S. P. ante*, 266; and see 1 Mer. 668-9.

(v) *Quære*: see *Allen v. Heber, ante*, 22, and *Hurst v. Winchelsea, ante*, 187.

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tenants; or, 3dly, That they took estates for life successively. As to the first, nothing is more certain, than that the testator meant to perpetuate his estate in his name and family; and, so far as the law will permit, we must carry that intent into execution. As to the second, the provisions of the will make such a construction absurd. During the minority of the persons entitled to take, the profits are to accumulate for their use. Are all to divide these profits when accumulated? Are all to take the names and arms of Daniel? Are all to make jointures of 200*l. per annum*? It is therefore necessary to adopt the third construction, that they are to take estates for life successively. But by what is this warranted? By reference to the other words of the will. Then, by the same rule of reference, you may ascertain the quantum of interest meant to be devised, as well as the joint or sole enjoyment of the devisees. The whole context shews, that the words of inheritance were here omitted by accident. The direction, that those to whom the estate should come, *and their descendants*, should take the name and arms, shews he meant to devise a descendible estate. The Case of *Collaton* and *Hellier* (u), before Lord *Hardwicke*, was not near so strong as this. I therefore am clearly of opinion, that Sir William Duckenfield took an estate tail; and think the case would not have borne a second argument, had it not been of so much consequence in point of interest.

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WILMOT, J.—I am clearly of the same opinion, and never had any doubt. I dare say, the variation in the wording of the will arose from a notion in the drawer (for though written in the testator's own hand, it is plainly the draught of some lawyer), that you cannot make an after-born son a tenant for life. I have known such a notion prevail in the country, though nothing is more untrue (w). Indeed, if you afterwards make a limitation to their issue, it will make them tenants in tail. Therefore he gave no estate specifically to these children, but left it to the operation of law to construe it. I believe the testator meant to give estates for life, and afterwards to their sons in tail, as to all the devisees; but he has not done so with respect to the sons in being, nor as to Hulton

(u) Or *Coryton v. Halyar*, 2 Cox, 340; cited in 2 Burr. 923, 2 Ves. Sen. 195, 4 Bro. C. C. 461, Fearn's C. R. 590, (8th ed.).

(w) "It was once doubted whether an estate for life could be given to unborn issue. The law is now clearly settled, that an estate for life may be limited to unborn issue, provided the deviser does not go farther, and give an estate in succession to the children of such unborn issue;" *per Lord Kenyon* in *Hay v. Earl of Coventry*, 3 T. R. 86. And this is explained by what was said by his Lordship in *Brudenell v. Elwes*, 1 East, 452, viz. "An unborn child may be made tenant in tail, but not tenant for life with a limitation to

his children as purchasers;" and that the doctrine, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child in succession, had been distinctly laid down by the learned Judge who delivered the opinion of the Judges in the Duke of *Marborough's* Case; which case is reported in 3 Bro. P. C. 232 (2d ed.), or 5 Bro. P. C. 592 (1st ed.). And in *Humberston v. Humberston*, cited *ante*, 505, *Ld. Cowper*, C., decreed estates tail to the sons unborn, and estates for life to those *in esse*, according to the doctrine of *cy pres* (as to which see *Nicholl v. Nicholl*, *post*, 1159).—See also *Godolphin v. Godolphin*, 1 Ves. S. 21; and Fearn C. R. 502.

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and the other remainder-man. And he certainly meant to give the after-born sons the same estate as to those *in esse*. Could he mean to disinherit their children, as he must have done (even if they had any) by the construction now contended for? You must connect this with the precedent and subsequent devises. What is the construction of those, must also be the construction of this.

YATES, J.—I am of the same opinion, and equally clear in that opinion. The after-born sons had not, could not have, offended the testator. There is therefore no room to suppose, he could intend to narrow his bounty in respect to them and their issue.

Judgment for the defendant (x).

(x) "As to the case of *Evans v. Astley*, the estate was limited in formal terms to the three first sons of the devisor's sister, and to the heirs of their bodies, and in the limitation to the fourth son those words were omitted: and afterwards, when the devisor was directing what was to be done in conformity to his will, he took it for granted that an estate of inheritance was given to the fourth son, for he directed the sons of that fourth son to take his name and arms. And I remember that in determining that question, the Court considered the rule adopted by Lord Hale, *necesse est secuti*; which was no pedantic or inconsiderate expression when falling from him, but was intended to convey in short terms the grounds upon which he formed his judgment. The kindred terms, to which the Court referred in *Evans v. Astley*, were the limitations to all the other

brothers, and a requisition that the devisor's name and arms should be borne by them and their descendants. And the devisor could not be supposed to have intended, that the estate, which was the substance, should go one way, and the arms and name, which were the shadow, another."—*Per Lord Kenyon*, in *Hay v. Earl of Coventry*, 3 T. R. 86. And in *Dee v. Dacre*, 1 Bos. & P. 260, *Buller, J.*, observed, that "with respect to the case of *Evans v. Astley*, the proviso, that the devisees and their descendants should take the name and arms of the devisor, was inconsistent with a mere estate for life." See also *Denn dem. Briddon v. Page*, Id. 261; *Dee v. Faughan*, 5 B. & A. 464. As to what words pass an estate tail, see the cases collected in 1 Roberts on Wills, 469 (3d ed.); *Bac. Abr. Leg. § Dev. (D)*; *Win. Abr. Dev. (C b.)*

COMBE *qui tam* v. PITT. (See *ante*, 437).

S. C. 3 Burr. 1586—1582.

ACTION on the statute of bribery (y), for corrupting three voters at last Ilchester election. Verdict for plaintiff, with 1500*l.* damages, subject to the report of WILMOT J., who tried the cause. And the defendant's counsel relied on three objections:—1. That the declaration states, that the party was bribed to vote for Mr. Lockyer *and Lord Egmont; and it came out in evidence, that it was for Mr. Lockyer and his friend: 2. That the declaration states, that Lord Egmont and Mr. Combe were candidates at the time of the bribe given; and no evidence was given thereof: 3. That it also states, that the persons bribed had a right to vote; but no evidence was given thereof, other than that they actually voted.

LORD MANSFIELD, C. J.—This is an action brought for three penalties for election bribery, for which very offence the defendant has been formerly convicted upon an information (x).

Action on the statute of bribery need not state all the parties for whom the bribe was

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given; nor 2dly, need it be proved that those parties were candidates; nor 3dly, need the voter's right of voting be proved.

(y) 2 G. 2, c. 24; and see further enactments against bribery in 49 Geo. 3, c. 113.

(x) *Ante*, 383.

COMBE *q. z.*
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And the Court, in giving judgment, considered he was liable to this action. Yet the reluctance of every man to see a person twice punished for the same offence operated strongly at the trial, in saving the case in this shape. The same also operated here, in hopes that the parties might come to some compromise. This has not happened. We are sorry for it: but the law must have its course. We must not make an illegal or dangerous precedent to get out of this statute, so long as it remains in force. Its extent and severity we all know happened by accident. As to the first objection: in penal actions the rule is, that the material fact must be charged; and that you must prove a fact charged, sufficient to warrant all the consequences of a verdict. The material fact here is, being bribed to vote. It makes no difference whether the proof was, that he was bribed to vote for both, or for Lockyer only. The second objection goes upon the vague idea of what is a candidate previous to the day of election. The poll is then the only evidence. The House of Commons, in the case of *Gore* of Tring, candidate for Bucks, determined, that nothing was evidence of being a candidate but the poll-books. Before the time of election any one is a candidate for whom a vote is asked. This very fact makes the person in whose behalf the bribe was given a candidate. As to the third objection, the defendant shall not dispute a man's right of voting, when he has asked [*525] him for his vote. It is a sufficient *proof of right, that he actually did vote. I am sorry I must be clear, that there is no ground for the objections.

WILMOT, J.—Of the same opinion. The material and substantial charge is, the bribe to give a vote at that election, for a person then a candidate. Had it been only proved that it was in fact given to vote for Lockyer, it had been sufficient. This action might be pleaded in bar against any other action for the same offence.

YATES, J.—Of the same opinion. *Id certum est, quod certum reddi potest.* Lord Egmont appeared to be afterwards the friend intended. But, apart from this, the offence against the statute is bribery, to give his vote in that election; it is immaterial for how many candidates. In any subsequent action for bribing the same voter for any other candidate, the defendant, by averment, might plead this recovery in bar. Had it been traversed, that Lord Egmont and the other were candidates, it would have been immaterial and bad. It is immaterial whether the voter had a right to vote or no; if he claimed to have a right, it is the same offence by the statute.

Discharge the rule, so far as relates to the entering judgment for the defendant—but the defendant is at liberty to move for a new trial, or in arrest of judgment, as he shall be advised.

Afterwards, in the same Term, *Norton*, Attorney-General, moved for a new trial for irregularity in the former trial; in that the record of *Nisi Prius* and plea-roll were not properly

made up: they stating only the declaration and the plea in bar of *nil debet*, but having totally omitted the previous plea in abatement, demurrer, and judgment; which, he alleged, were necessary to be entered of record in order to bring a writ of error, if necessary. And he cited *Harpur* and *Davy*, Carthew, 498 (a); and a rule was made to shew cause next Term (b).

COMBE q. 1.
PITT.

(a) Or rather the case of *Dubortine v. Chancellor*, there cited; *S. C.* Carth. 447, 5 Mod. 399, 12 Mod. 190, 1 Ld. Raym. 329; where a verdict for the plaintiff was set aside, because he had omitted to put a plea in abatement upon the *Nisi Prius* roll. But the Court of King's Bench afterwards made a rule, that a copy of the plea in chief only should be delivered and paid

for; 7 Mod. 51, 1 Salk. 5.

(b) This rule was afterwards discharged; the Court held that the irregularity was cured by the defendant's accepting the issue and paying for it. His objection ought to have been made at that time: it was too late to make it then; *Combe v. Pitt*, 3 Burr. 1682.—See Tidd's Pr. 755 (ed. 1821).

SWANN v. BROOME.

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S. C. Ante, 496.

THIS case was again argued by *Glynn*, Serjeant, for the defendant in error; who alleged—1. That days of appearance are of two sorts, compulsory and voluntary; and that all amicable proceedings have relation to the latter only. Therefore, the tenant having appeared *gratis*, it shall be intended, that he appeared on the first possible day: which is the *essoign* day of the Term, which is the true day of appearance; the *quarto die post* being only a day of grace: *Co. Litt.* 134; 1 *Bulstr.* 35; *Dyer*, 361. In *Pigot on Recov.* 58, lease and release to make a tenant to the *præcipe* was on 27th November: recovery had in the same Term, which related back to November 26th, being the *essoign* day. Therefore held, there was no tenant to the *præcipe*. *Bro. Abridgm. tit. Relation*, 40; *scire facias* on judgment in debt—writ of error had been brought, tested the *quarto die post*: held, that it did not suspend the judgment; that being antecedent, *vis.* on the *essoign* day.—2. That the *essoign* day being on a Sunday makes no difference:—That business was formerly transacted on a Sunday may be inferred from the number of returns which are fixed on Sundays: That Sunday is still supposed the technical day, though, in latter times, no business has been done thereon. Several things are permitted by law to be done on a Sunday. *Cro. Car.* 466; the Court was adjourned to a Sunday, and it was said, the Court will meet on Sundays for the purpose of adjournment. If a county be adjourned to a Sunday, and election of knights of the shire be necessary in the mean time, they shall *proceed to election that day. In a writ of right, the appearance must be on a Sunday. Notices to appear are always made out for Sunday, if that be the *essoign* day; if the Monday is inserted in its stead, the notice has been held bad. Judicial writs made returnable on a Sunday are bad, because there is no day of grace. *Dyer*, 312. But upon original writs

No judgment can be given on a Sunday; and if the return of a writ of summons in a common recovery be on a Sunday, and the vouchee dies on that day, the recovery is bad.

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the return is made on Sundays, because the tenant may have his option to appear on that or a subsequent day.

Blackstone, for plaintiff in error.—The judgment cannot relate back to the first day of the Term, for that would contradict not only the fact, but the record. The summons is returnable in one month of Easter, which is in the middle of the Term; and no fiction can make the judgment prior to that return. The doctrine of relation holds, where nothing appears to the contrary on the record. But when the sheriff is commanded on the roll, to have the parties here on *Mens. Pasch.* and it is then entered, "On which day come here, as well the" said A., &c."—the Court cannot wink so hard, as not to see and take notice, that the judgment could not be given a fortnight before the day of appearance. *Selwin and Selwin (c)*, P. 33 Geo. 2, and M. 1 Geo. 3, *King's Bench*: The Court would not consider the judgment in a recovery, as prior to the return of the writ of entry.

2. As to the true question in this case, Whether the vouchee dying on a Sunday, the nominal return day of the writ of summons, the judgment is not void, as not being given in law till the Monday:

[*528] I admit there is no fraction of a day: But if any judgment could have been given on the Sunday, it would be sufficient, if Swann was alive on any part of it. I admit also that judgments shall relate back as far in the Term, as the facts appearing on record will permit, but no farther. And I will allow, that recoveries are to be favoured, as being the *legal conveyances of tenant in tail, as much as feoffments and wills are the conveyances of tenant in fee. But as feoffments must be legally completed by livery, and wills duly executed under the statute of frauds, so recoveries must be completed by judgment during the life of the vouchee. It was said, he has done every material act in his power to perfect the recovery, and therefore the Court will avail themselves of technical niceties to support it. But he has not, nor could he, appear in Court, and vouch over the common vouchee, &c., which are material forms. His intention is nothing to the purpose, as he did not live long enough to carry it into execution. If one makes a feoffment and seals a letter of attorney to deliver seisin, and dies before livery is actually given, the feoffment is void; *Litt. 66*. Judgment could not possibly be given on the nominal return day, being Sunday, and therefore no juridical day; and before the Monday, Edward Swann was dead. It will be necessary to look back to the original of our Terms and Returns, to maintain this argument. *Spelman* (of the Terms) has shewn, that formerly all the year was one continual Term, till the church interposed, and exempted certain holy seasons from profanation, which occasioned our several vacations. Certain festivals, and all Sundays were likewise exempted. As to Sundays in parti-

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cular, they were protected by a canon of the church and an imperial edict, still extant in the Theodosian Code. And in England, L.L. Edw. Conf. c. 3, established the *Dies Pucis* to be (*inter al.*) from three in the afternoon on Saturday till Monday morning. Stat. 51 Hen. 3, called *Dies communes in banco*, did not regulate the length of the Terms, but appointed, or perhaps confirmed, certain days for return of writs, generally at a week's distance from each other, and governed by some festival of the church. And while the Parliament was regulating these Returns by those solemn festivals, it is not to be supposed they would direct any secular business to be done on Sundays contrary to the law of the church, notwithstanding some return days are always on a Sunday. They so revered the canons, that no oaths could be administered in Lent or other holy times, without licence from the Bishop to the Judges: *Rym. Fœd. temp. Hen. 3, *passim*; Britton, c. 53: till by statute West. 1, c. 51, assizes were allowed, by assent of all the prelates, to be taken in Lent, &c. at the special request of the King made to the Bishops, because it was charity to do right at all times. Which expression, "at all times," extends only to the *Dies juridici*, which the Lord's Day is not; 2 Inst. 264; Co. Litt. 135 a (d). Writs original were made nominally returnable on these days, as being more notorious, and no profanation could happen, since there were three subsequent days of grace; but (as Mr. Serjeant has observed) judicial writs, which have no days of grace, could not be returnable on Sundays, because a profanation would necessarily ensue. That the Courts never sate on these days of nominal return, when Sundays, appears from the Register, 19 a: When a tenant in a real action cast an essoign, a day was always given him to warrant that essoign. And the essoign being, in this case, *servitium domini regis*, and the day of the return in *quindena Pasch.* which is always on a Sunday, the King warranted the essoign by certifying, that the tenant was in his service, *die lune in crastino xv. Pasch.* "*Et dictum fuit die lune in crastino quindena, quia, die Dominica, quæ fuit quindena, placita non tenentur.*" Whenever therefore the essoign day of any return falls on a Sunday, the Court not only never sits in fact, but is not supposed to sit in law till the Monday following. Midsummer-day is certainly no day in Court; the Term is always adjourned by proclamation, from the 23d to the 25th June. It happened last Term to fall upon *octab. Trin.*, which is always a Sunday, and a return day. Suppose the writ of summons had been then returnable, shall the judgment relate back to a day on which the Court confessedly cannot sit? It might as well relate back to the vacation. And as Sunday is a *dies non*, as well as Midsummer-day, the relation back is equally impossible. Whenever a return-day falls on a *dies non*, the essoign day and day of exceptions are consolidated. The *dies non* gives denomination to the return, but the business

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must be transacted the day after. Cro. Jac. 16, Monday is the day of *tres Trin.* *1 Bulstr. 35; Judgment given on the essoign day may be good, because it is intended the party appeared on that day; (which cannot be intended on a day when the Court cannot sit). Cro. Car. 11, Monday is the first day of *octab. Trin.* and *tres Trin.* *Davy and Salter*, Salk. 627, 6 Mod. 250, by *Powell, J.*; in a writ of right (where the appearance must be on the first day) if the essoign day falls on a Sunday, Monday is the day of appearance, for Sunday never was, nor is, a juridical day. *Et per Cur.* Where the essoign day is on a Sunday, a judgment can only relate to the first juridical day, which is Monday.

[* 531] Lord MANSFIELD, C. J., delivered the opinion of the Court. Though a common recovery is in substance nothing more than a conveyance, yet it requires due ceremonies and solemnities, as much as a will of lands. It must be governed by analogy to the proceedings in a real suit. Want of regularity will therefore vitiate a recovery, as much as the want of a third witness will a will. If nothing appears on the record to the contrary, a judgment relates back to the essoign day of the Term: If it appears on the face of the record, that judgment could not be given on the essoign day of the Term, it relates back only to the essoign day of the return. And had this essoign been on a week day, the tenant being then living, the judgment must have been good (e). But it is objected, that being on a Sunday, and the tenant dying that day, the judgment is therefore bad. If no judicial act could be done, if the Court could not possibly sit on a Sunday, then the recovery is clearly wrong. The point therefore is only, whether by law a judgment can be given on a Sunday. No authority has been produced to shew that it may; but it is argued, that many judicial acts are done on *Sundays; that returns are made on that day; that the tenant in tail may voluntarily come in before the *quarto die post*, this being an amicable suit; that fairs, &c. were anciently held on Sundays, &c. But when the history of our Courts, and the alterations made in them by the canon and common law, are considered, there will remain no difficulty. Sir H. Spelman has shewn, that Christians, to distinguish themselves from Pagans, made no distinction of *dies fasti* and *nefasti*, and sate on Sundays as well as other days. But in 517, a canon was made against it: In 895, an imperial constitution to the same purport; and in 932, another. Solemn seasons were excepted from doing juridical acts by the laws of Edward the Confessor. The statute Westm. 1, c. 51, allowed assizes to be taken in Lent, and other laws allowed other things to be done in holy seasons. But Sundays have been always settled to be no juridical days; Mirror, c. 5; 2 Inst. 264; Finch's Law, c. 5; Dyer, 168. In Sir W. Jones, 156, held, that an information exhibited on a Sunday was good, but that a judgment could not be entered on that day (s). As for the argument

(e) *Shelley's Ca.*, 1 Rep. 93 b; Moore, 136. (s) See also *Dr. Clea's Ca.*, Litt. R. 19.

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of returns being fixed upon Sundays, those were formed before the canonical prohibition took place: And they were never altered by canon or otherwise, which only have prohibited the holding of pleas on that day. Writs, therefore, and their returns have continued in their original form and course, and the business is done on the Monday: F. N. B. 17, Old Edition; Year Book, 12 Ed. 4, fol. 8. The practice (relied on) of giving notices to appear, &c. on Sundays, is only because they must follow the writ; but that is known to signify only Monday. It is said that no statute has prohibited the Courts from sitting on Sundays: The reason is, because no Courts ever sate on that day. It is held, in *Mackally's Case*, 9 Co. 66 b, that judicial acts cannot be done on Sundays, but ministerial may. It was said, that a mere legal relation will not violate the Sunday, the judgment being in fact given on another day. But you shall not, by any relation, presume what is an utter impossibility. It was said, that the recovery was actually complete in substance at the nominal day of the return. But forms are necessary to be maintained. It is no recovery, if the tenant dies before judgment (*f*); he has not properly executed his conveyance in due form of law. It is a hard *case, and we have laboured in all methods to support this recovery, but could not. Therefore,

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Judgment must be reversed (*g*).

On a writ of error in *Dom. Proc.* the judgment of B. R. affirmed (*h*).

(*f*) Cruise's Rec. 123. See *ante*, 498.

Vin. Abr. Entry (G 12); Recovery (P); Voucher (H c.).

(*g*) See *Gibbons v. Stevenson*, post, 1223; 2 Wms. Saund. 42 k; Bac. Abr. Fines & Recoveries (D), p. 243 (8vo. ed.);

(*h*) 6 Bro. P. C. p. 132, or p. 333 (Toml. ed.). 5 Crui. Dig. 356 (3rd ed.).

SITTINGS IN TERM.—26 NOVEMBER, 1764.—LONDON.

FORBES, Executor, v. WALE.

DEBT on bond, dated 20 March, 1732. Pleas: *non est factum*; *solvit ad diem*; and *solvit post diem*. The plaintiff insisted on reading the bond without any proof of the execution, being of so old a date (*i*). Objected for the defendant, that it

Bond of thirty years standing cannot be read in evidence; if no payment of interest or other marks of authenticity.

(*i*) Bonds, deeds, and other writings, of thirty years standing, and coming from the proper custody, as bonds found among the papers of a public company, or of a deceased obligee, are said to prove themselves, and will be received in evidence without further proof; *Chelsea Water Works v. Couper*, 1 Esp. 275, where *Ld. Kenyon* cited and recognized this case. So entries in a steward's book relating to a manor; *Wynne v. Tyrwhitt*, 4 B. & A. 376. So an ancient book of a former tithe

collector; *Jones v. Waller*, 2 Eagle & Y. 141. Some account however ought to be given of the place where the deed, &c. was found, and if there be any blemish by rasure or interlineation, it ought to be regularly proved; Bull. N. P. 255; *Roe dem. Brune v. Rawlings*, 7 East, 291; *Swinerton v. Marquis of Stafford*, 3 Taunt. 91. It seems, however, that if the subscribing witness be alive, it must be proved by him: see *Rees v. Mansell*, 1 Selw. N. P. 492, n. (9), ed. 1812. In settlement

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could not be read till proved, there having been no payment of interest, or any other marks of authenticity; and that, if the length of the date was alone sufficient to establish it, a knave has nothing to do but to forge a bond with a very ancient date. Lord MANSFIELD, C. J., allowed the distinction, and directed the bond to be proved. Plaintiff proved, by two persons, that it was the defendant's hand, and that one of the subscribing witnesses was dead; but, being himself examined, acknowledged the other to be living. Whereupon he was nonsuited; but Lord MANSFIELD directed a new trial to be moved for, which, he said, should be at the costs of the defendant: But, on moving the Court the last day of Term, it was refused, because, by the nonsuit, the parties are out of Court (k). *Morton pro querent. Blackstone pro def.*

N. B.—The defence on the merits was, that the defendant had been absent from England above twenty years (l), knew nothing of the bond, but, if genuine, imagined it paid; the obligee being dead, but this bond found among his papers uncanceled, and without any interest ever paid thereon. See Lord Raym. 1370; Stra. 652, 826, 827.

cases, the mere production of a parish certificate above thirty years old is sufficient, without giving any account of it; *R. v. Ryton*, 5 T. R. 259; *R. v. Netherthorpe*, 2 M. & S. 337. See further as to the custody of ancient writings, *Manby v. Curtis*, 1 Price, 225; *Bertie v. Beaumont*, 2 Price, 307; *Bullen v. Mitchell*, Id. 399, 4 Dow, 297; *Randolph v. Gordon*, 5 Price, 312; Vin. Abr. *Evidence* (A. b. 5, 56).

(k) *S. P. Talbot v. Pyot*, Pract. R. 411; *Hartley v. Atkinson*, Barnes, 317: but for the sake of obtaining justice, and where it appears that the Judge has directed a nonsuit by mistake, a new trial may be had after one; *Sadler v. Eeans*, 4 Burr. 1984; *Buccall v. Hogg*, 3 Wils. 146; *Rackham v.*

Jesup, Id. 338; *Rice v. Shute*, post, 698.

(l) Where there has not been any interest paid upon a bond given twenty years, or even less, as eighteen or nineteen years, before action brought, or any acknowledgment by the obligor of the existence of the debt during that period, the law in general will presume it to be satisfied; *Oswald v. Legh*, 1 T. R. 270; *Colwell v. Budd*, 1 Camp. 27; *Willame v. Gorges*, Id. 217. But if the obligor has resided abroad during the twenty years, payment will not be presumed; *Newman v. Newman*, 1 Stark. 101.—See Vin. Abr. *Evidence* (A. b. 56); *Length of Time* (A); *Cooper v. Turner*, 2 Stark. 497, and Stark. Ev. P. iv, p. 1090.

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HILARY TERM,—5 GEO. III. 1764.—K. B.

TIMMINS v. ROWLISON.

S. C. 3 Burr. 1608.

Parol notice to quit, by a tenant on a parol lease, is within stat. 11 Geo. 2.

REPLEVIN. Defendant avows, for that, on 6th April, 1760, he demised the *locus in quo* to the plaintiff, for one year, from 5th April preceding, at 19l. 10s. *per annum*; who gave notice, that he would quit 5th April, 1761, but held over till 10th October: Wherefore he avows for double the value for half a year. Plaintiff pleads a demise from defendant for one year, from 5th April, 1760, and so from year to year, as long as both parties pleased, and traversed the notice to quit, whereupon issue joined: which was tried at Stafford Lent Assizes,

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1764, where it appeared, that the plaintiff held the premises for one year, from 5th April, 1760, and so from year to year, as long as both parties pleased; that the demise was only by parol, and that the notice proved to be given by plaintiff to defendant to quit, 5th April, 1761, was only by parol likewise. Therefore *quære*,—1. Whether the plaintiff was liable to pay double rent for not quitting after giving a parol notice.—2. Whether, as plaintiff held under a parol demise as tenant from year to year, this is a holding under the statute 11 Geo. 2 (a), so as to subject the plaintiff to double rent for not quitting after notice. This was argued last Term by *Stowe* for plaintiff, and *Ashhurst* for the defendant; and now by *Price* for plaintiff, and *Nares*, Serjeant, for the defendant.

* It was argued for the plaintiff, that this act must be confined to leases, wherein an express power is reserved to determine the tenure by notice, and to notices in writing only; because the statute speaks of the time in such notice mentioned and contained, which words are not applicable to parol notices.

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For the defendant it was insisted, that, this being a remedial law, the words might be fairly extended to parol leases, which are the most common, and to parol notices; without which the clause would be nugatory, and affect only such tenants as were foolish enough to give written instead of parol notices.

LORD MANSFIELD, C. J.—Statutes *in pari materid* are to be all taken as one system to suppress the mischief. The mischief is an act of vexation, inconvenience, and injustice, by the tenant after notice given by himself, after the landlord has another tenant ready, to stop short and say, “I won’t quit.” This is an universal sort of holding, and therefore this practice might be a very extensive evil. The Legislature, in 4 Geo. 2 (b), made a provision where the landlord gives notice; and afterwards, in 11 Geo. 2, this additional provision in case the notice comes from the tenant. The two laws are only parts of the same provision. This case is said not to be within the words, “*where tenants have power to determine*.” Why so? There are two sorts of powers, one arising by special compact, which this is not; the other by construction of law, as in the present case of parol leases for a year. But, 2dly, it is said the notice must be in writing. Why? Does the act say so? No. But the act 4 Geo. 2, does. That is the strongest reason against it: It is here *purposely* omitted: The drawer of

(a) C. 19, s. 18, which enacts, “that in case any tenant shall give notice of his intention to quit the premises by him holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained; that then the said tenant, his executors and administrators, shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid; to be levied,

sued for and recovered, at the same times and in the same manner, as the single rent or sum before the giving such notice could be levied, &c.; and such double rent or sum shall continue to be paid during all the time such tenant shall continue in possession.” The time mentioned in the notice must be a fixed and certain time; *Farrance v. Elvington*, 2 Camp. 591.

(b) C. 28; *post*, 1075, n.

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this act could not leave it out by accident, having the other act before him. As to the words, *mentioned and comprised*, may not that be done in a parol notice? Certainly it may. I therefore think this a case within the mischief, the preamble and the enacting words of the statute 11 Geo. 2.

[*535] WILMOT, J.—Same opinion. As to the notice being in writing, the different penning of the acts furnishes evidence *of different intentions. The 4 Geo. 2 respects, in my opinion, chiefly leases for lives or for long terms of years, and if the tenant holds over, and the landlord gives notice in writing for him to quit, he shall recover not double rent (which would be frequently trifling), but double value(c). There is no power of distress in that act, because no certainty of the value.—There are two good reasons why one should be in writing and the other not: 1. If the tenant gives such notice as will justify his leaving the farm, and does not leave it, that is the mischief which the act meant to meet, and parol notice is sufficient for that. 2. Landlords can usually write, and tenants cannot: therefore the landlord's notice is to be in writing, the tenant's not. This case is within the preamble and the enacting words; but had the preamble been confined, I should have been for extending the remedy according to the enacting words. These tenancies are the most usual of any. It has almost extinguished tenancy at will, which was a most unreasonable and inconvenient tenure to both parties. Then came tenures for a year certain, which were better, but still inconvenient; to turn out or quit at the end of the year without notice. This produced the present rule, that landlords and tenants should mutually give reasonable notice to quit; and there, if a landlord brings ejectment, it is always required that he shew he hath given reasonable notice. What is reasonable is matter of circumstances. This brings the present lease within the words of the act. They have power to quit and determine, upon giving reasonable notice.

DENNISON and YATES, Js., absent.

Judgment for the defendant.

(c) See *Cutting v. Derby*, post, 1075, and the cases there referred to.

FROGMORTON, Lessee of BRAMSTON, v. HOLYDAY and Others.

S. C. 3 Burr. 1618.

Circumstances,
twisted together,
will interpret a
devise to be in
fee, which, on
the face of it, is
only for life.

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EJECTMENT. Verdict for plaintiff on this special case.—Margaret Haslewood, by her will, (duly executed, bearing date 28 October, 1719), "As to all her worldly affairs and estate," disposes thus: "To her son David and his heirs for ever, her malt-kiln, of the value of 10*l. per annum*. To her daughter Elizabeth Locking, her house and garden in *the ropery; and after her decease to her two sons John and David Locking, share and share alike. To her son John Haslewood, a house and garden, charged with the payment of 50*l.* out of the yearly

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rents and profits, till the same should be discharged, for the benefit of her daughter Margaret Holyday. And if said John Haslewood should die in his minority, then the said house and gardens to the testatrix's daughters, Elizabeth Locking, Margaret Holyday, and Hannah Haslewood equally, share and share alike. To her daughter Hannah, and her heirs for ever, another house and garden. And after several pecuniary and specific legacies, she bequeaths the residue of her personal estate to her executors George Holyday and Elizabeth Locking; whom she appoints guardians to her son Haslewood, desiring them to cause him to be brought up to good education and learning." Her son David had been set up in business by his father, who gave him at times upwards of 500*l.*, and two messuages, value 32*l. per annum*. And the father also devised an estate of 40*l. per annum* to his wife Margaret for life; remainder to his son John in fee. John was about seven years of age at the death of his mother, and David twenty-three; and the premises, by her devised to John, were of the annual value of 10*l.* John entered, and died seised in 1762; and David his brother died before him, leaving David his son and heir, who, 20th September, 1758, conveyed said premises to the lessor of the plaintiff in fee.—*Qu.* Whether an estate for life, or in fee, passed to the said John, by the said will?

This case was argued last Term, by *Wallace*, for the plaintiff, who insisted—1. That although, where an estate is given paying a certain sum to a third person, the estate must be fee-simple, else the devisee is not secure; *Collier's Case*, 6 Co. 16; Cro. Car. 37 (*d*); Comyns, 353, *Fowler and Blackwell*: yet in the present case he cannot be a loser, supposing it an estate for life; as it is not a sum in gross, but is payable out of the growing rents and profits. 2. That in other parts of her will the testatrix has devised to other persons and their heirs, which shews she knew how to devise a fee-simple, when she intended to give it.

**Hotham*, for defendant.—Wherever such a charge is laid [*537] on an estate, as would leave nothing to the tenant for life, it shall import an estate in fee. In the present case, for five years the devisee shall have nothing. 2. All devises must be supposed positively beneficial, not merely (negatively) not prejudicial to the devisee; 2 Mod. 25, *Read and Hatton*. Courts have adjudged, that gross charges carry a fee, and that charges on the profits, unconnected with other circumstances, an estate for life; Moor, 852. [The] circumstances here are: a woman providing for all her children, in low circumstances and illiterate, gives to both the others a fee expressly, [and she] had no reason to except the other son, whose age makes it impossible he should have offended. The clause of substitution, in case he dies under age, shews it to be a fee. It would be absurd to fix a period, when only the estate should

(d) Not in point.

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end, if a mere life estate was intended: *Purefoy and Rogers*, 2 Saund. 388 a.

The case was again argued this Term, by *Blackstone*, for plaintiff.—The words, on the face of them, carry only an estate for life. What are the circumstances alleged to shew a contrary intent of the testatrix? 1st, From the will itself; 2dly, From other collateral matter.—1. It is said, that, in the preamble, she declares her intent to dispose of all her estate. Where words have been doubtful, Courts have prayed in aid of these words to strengthen other probable arguments; *Forrest*. 157 (e). But there is no case, wherein any substantive determination has been formed, from these words only; which are the usual hackney preface to all wills, and inserted of course by every schoolmaster in the country.—2. It is said, that the largeness of the charge is such, that no considerable benefit will pass to the devisee, unless the estate be a fee; and therefore the rule in *Collier's Case* must be extended *to take in the present. But the charge is only five years rent; the life estate of John was worth 16 or 17 years purchase. Besides, it is not necessary that the devise should be certainly beneficial. Sufficient, if it may be beneficial, and cannot possibly be prejudicial to the devisee; 2 Mod. 25, *Read and Hatton*.—3. As to the cause of substitution. *Purefoy and Rogers* is only a note by the reporter, and is the case of a devise of an inheritance in express words, and the substitution is to the heir-at-law; in both which it differs from the present case. All the cases where an implied fee arises from a substitution, are where the heir is the substitute: and sometimes, even that has not been held sufficient; *Comyns*, 353.—4. That the testatrix mentions only the *residuum* of her personal estate; which shews she imagined she had disposed of all her realty. This argument proves too much; it proves, that wherever a testator is silent about his reversions in fee, his precedent devises must be intended to be fee-simple, and the heir shall never take an undevised *residuum*. When the testatrix meant to give away a fee, she knew how to do it, as appears by two of her devises. If these circumstances operate nothing singly, they can do nothing conjunctly. Twenty defective titles will not amount to one good one. Next, as to the circumstances of the family. Both sons pretty equally provided for by the father. John had an estate of 40*l.* *per annum* in fee. This might be the reason why the mother substituted the sisters in case he died under age, and not otherwise. For then his 40*l.* *per annum* must have descended to his brother David; but if he lived to twenty-one, he might alien it from his brother; and therefore she directed, that the substitution of the sisters should then cease, and David be entitled to this reversion at all events. The Court will not set bounds to the discretion of parents, and say, they shall never be supposed to make a distinction between

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their children, even in favour of an eldest son. And considering the savings that would be made during the infancy of John, the distinction she has made is not worth considering.

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Wedderburn, for defendant, insisted, that if none of the reasons before taken notice of would be sufficient separately to establish an estate in fee in the devisee, yet, taken conjunctively they might, and cited *Scot* and *Aubrey*, Comyns, 337. [*539]

Lord MANSFIELD, C. J.—The will must be construed by taking the whole together, as in the Case of *Coryton* and *Hellicier* (*f*), where an estate was given for 99 years, omitting the words, “if he shall so long live;” but this was set right by the other parts of the will. The question here is, whether John had a fee bequeathed to him. I believe that in most cases, where devisees have been adjudged not to have the fee, it has been contrary to the testator’s intention, who did not know the difference between a devise of lands and of chattels. However, rules of construction there must be, and Courts of justice must stick to them, unless from concurrent circumstances they can gather the intent to be otherwise. Now here, 1st. The testatrix has declared her intent to devise “her worldly estate.” That certainly will not make the will carry an estate that is clearly omitted; but if it be dubious, whether the estate is omitted or no, it will help the interpretation (*g*). She has specifically mentioned all the real estates she had, and disposed of them some how or other. There is a sweeping residuary clause of the personalty, but no mention made of the realty. 2dly. There is a charge on the rents and profits. A sum charged in gross, however small, gives a fee to the devisee charged; (before the Case of *Cloudesley* and *Pelham* (*h*), it was not looked upon as a charge upon the heir): But a charge on the annual profits may leave it an estate for life (*i*).—This is a middle case. One reason why this mode of payment was ordered is apparently, because John was a minor; else, perhaps, it would have been charged in gross. 3dly. The limitation over, in case John died before 21, to his sisters shews, she meant the heir should not have it. Where an estate is directed to be taken away from an institute on a contingency, which does not happen, it shall not be taken away in any other circumstance: And so, *vice versa*, where it is to be taken away upon the not happening of a contingency, the substitute shall not take it on any other circumstance. (*Cic. de Oratore*). In

(*f*) 2 Cox, 340; cited in 2 Burr. 923, 2 Ves. 8. 195.

(*g*) See *Frogmorton v. Wright*, post, 891, n. (8).

(*h*) 1 Vern. 411; *Beachcroft v. Beachcroft*, 2 Vern. 690.

(*i*) “In cases of this kind, the question has always been, whether the charge is to be paid out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case

the devisee takes only an estate for life, but in the latter he takes a fee; otherwise he might be a loser by the devise:” per Ld. Kenyon, in *Doe v. Holmes*, 8 T. R. 2; S. P. per Ld. Mansfield, 1 Cowp. 239; *Goodtitle v. Maddern*, 4 East, 496; *Freak v. Lee*, 2 Show. 38; *Doe v. Richards*, 3 T. R. 356. See also *Salmon v. Denham*, 1 Com. R. 323; *Doe v. Gillard*, 5 B. & A. 785, 1 D. & R. 464; *Frogmorton v. Wright*, post, 889, and *Oates v. Cooke*, post, 543.

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Jones and Wescomb(k), an estate was given on the contingency of the child, of which the testator's wife was then ensient, dying before 21. The wife proved not to be en^sient: The estate did not pass. This was the only contingency on which the testatrix meant to give away the fee from John and his heirs(l). The reason given by Mr. *Blackstone* is too refined for people in such circumstances as the testatrix. As to the omission of the word "heirs" in this devise and mentioning them in another, little stress can be laid upon it(m). Therefore, as there is sufficient on the face of the will to carry an estate in fee, the intent thus collected must govern the interpretation.

WILMOT, J., accord.—This is a kind of loose evidence and must be twisted together. The reason of using the word "heirs" in the other devises, and of omitting it here, might possibly be this:—the will-drawer might think the substitution could not have taken place, if the first devise had been to John and his heirs. But the only event in contemplation of the testatrix, upon which she intended to take away the benefit she had given, was in my opinion the death of her son before the age of 21.

DENNISON and YATES, Js., absent.

The plaintiff was nonsuited.

(k) 1 Eq. Abr. 245, Pre. Ch. 316, Gilb. Eq. R. 74.

Doe v. Cundall, 9 East, 400, where a similar construction was adopted.

(l) This doctrine was recognized and fully approved of by Lord *Ellenborough* in

(m) But see *Doe v. Martin*, 4 T. R. 69, per *Buller, J.*

THE KING v. KEARSLEY et Al.

Judgment, for
printing the
North Briton,
No. 45.

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DEFENDANT was convicted on an information filed by the Attorney-General, (for printing the North Briton, No. 45) in Easter, 1763; to which he pleaded in Trinity Term, but was not brought to trial till the sittings after Trinity, 1764. He was brought up in Michaelmas Term following for judgment, when he made affidavit, "That, on 29th April, 1763, Lords "Halifax and Egremont, then Secretaries of State, told him, "that the object of their resentment was the author not the "publisher.—That, 16th November, 1763, he waited on Lord "Halifax, who assured him upon his honour he knew nothing of "the prosecution, and that, if he had any influence on the gen- "tleman who conducted it, he should not be punished, unless "it appeared absolutely necessary, * which he supposed it was "not." Whereupon he was remanded to give the agents for the Crown an opportunity of answering this affidavit. Now on the first day of this Term *Norton*, Attorney-General, produced the original letter from Lord Halifax to Mr. *Yorke*, then Attorney-General, for filing the said information, dated 9th May, 1763, and declared, that no directions or even hint had been since given for stopping the same; wherefore he was obliged in duty to proceed upon it: *Quod fuit concessum per curiam*. But no affidavit was produced from Lord Halifax, the surviving

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Secretary, without which Lord MANSFIELD, C. J., and WILMOT (*absent*. DENNISON and YATES, Js.) declared, they must take the facts to be true, which were an implied though not express undertaking in point of honour to excuse the printer, if he would deliver up his principal. They were not clear how far they could take notice of this in their judgment, but inclined to think they ought. However, to ease the Court from this embarrassment, they recommended an application to Lord Halifax to know, whether he would instruct the Attorney-General to pray any and what judgment, as the Attorney must be under his directions, this being entirely a Crown prosecution. Afterwards, he was discharged on entering into a recognizance of 200*l.* to appear, when required.

Williams, for republishing the North Briton in volumes, and, among the rest No. 45, with notes, was fined 100*l.*, and ordered to be set once in the pillory, imprisoned six months, and to give security for his good behaviour, for seven years; himself in 500*l.* and two sureties in 250*l.* each (*n*).

(*n*) See the proceedings against the author, *R. v. Wilkes*, 2 Wils. 151, 4 Burr. 2527, 19 How. St. Tr. 982. He was fined 500*l.* and imprisoned 10 months.

THE KING v. ROBINSON.

MOTION for an information against the defendant, knight of the shire for Westmorland, for attempting to bribe one Coulthard, an alderman of Carlisle, to vote at the election of an alderman in June, 1763. Rules were then depending against Coulthard's brother for bribery at the election of a mayor at Michaelmas, 1764. The attempt charged was saying, after many persuasions, "I would give 100*l.* rather than you should not go up to the hall, and vote for Mr. *Senhouse," who was then the only candidate; but Coulthard disliking him had absented himself.

General reasons
for refusing to
grant informa-
tions.

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Lord MANSFIELD, C. J.—Informations at common law (which are very ancient in this Court) were filed by the coroner (*o*), who did it upon any application, as a matter of course. The statute (*p*) was therefore made to limit it: and other grounds there are, by which the Court has limited itself. 1st. As to the merits of the person applying (*q*): for they may be under such circumstances, as that the Court will not interpose to favour them: 2d. The time of application (*r*). As to this, there

(*o*) See 4 Bla. Comm. 308; *R. v. Berchet*, 1 Show. 106; 3 Bac. Abr. *Informations*, (D).

(*p*) 4 & 5 W. & M. c. 18, which provides, that the clerk of the Crown in K. B. shall exhibit no information for trespasses, batteries, and other misdemeanors, except by express order of the Court, nor issue process, till the prosecutor has given a recognizance in 20*l.* to prosecute with effect: see *R. v. Howell*, Ca. temp. Hard.

247.—S. 6 contains an exception of informations filed by the Attorney-General *ex officio*. 2 Hawk. P. C. c. 26, s. 5, *et seq.*; Bac. Abr. *ubi supra*.

(*q*) *R. v. Bickerton*, 1 Stra. 493; *R. v. Hankey*, 1 Burr. 316; *R. v. Peach*, Id. 548; *R. v. Webster*, 3 T. R. 388.

(*r*) *R. v. Harries*, 13 East, 270; *R. v. Marshall*, Id. 322; *R. v. Bishop*, 5 B. & A. 612.

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is no precise number of weeks, months, or years; but, if delayed, the delay must be reasonably accounted for. This consideration is more necessary in election contests than in others: there is ill blood enough without this addition to it. 3d. The suspicious state of the case, *ex evidentiâ rei*. 4th. The consequences of granting the information. On which account the Court laid down the rule, that they would not grant one for bribery at parliamentary elections till after two years were expired (s), in which civil actions may be brought. Now, 1st. As to the time. We took it, when the rule to shew cause was granted, to have been the same election, for which the other motions were made; but it appears to be a former year, and the delay is not accounted for. 2dly. As to the circumstances of the prosecutors. It is moved by persons prosecuted for bribery at a subsequent election; hereupon I rest my opinion: Though 3dly. As to the suspicious state of the case: There was no opposition at the time, and therefore no visible necessity for such an attempt, which renders it improbable.

WILMOT, J., same opinion. DENNISON and YATES, absent.
Rule discharged (t).

(s) See *ante*, 380, n. (w).

(t) See also *R. v. Spriggins, ante*, 2; *R. v. Kinnersley*, 294, n. (s).

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EASTER TERM,—5 GEO. III. 1765.—K. B.

SIR RICHARD ASTON, Knight, late Lord Chief Justice of the Court of Common Pleas in Ireland, was this Term appointed a Justice of the Court of King's Bench, in the room of Sir THOMAS DENNISON, who had resigned.

OATES on demise of MARKHAM v. COOKE.

S. C. 3 Burr. 1684.

Devise of annuities in fee, payable by an executor, and some of them to the heirs at law, vests the estate in the executor in fee.

IN ejectment. Plea, not guilty. Verdict for plaintiff on this special case. George Beaumont, by his will, dated 29th September 1760, gave "to Elizabeth Smith 3*l.* *per annum* for life, "to be paid by his trustee and executor; and after her decease, to her sister Esther Blaksley; and after her decease, to another Elizabeth Smith, and her heirs for ever. "And also three more annuities of 3*l.* *per annum* each, to divers legatees and their heirs, to be paid by his trustee, John Cooke, yearly. *Item*, to William Parkin and his heirs, 10*s.* " *per annum* upon the account of his being trustee to this the "testator's will." And, after other pecuniary legacies, he wills, "that William Frith the tenant shall not be removed "during his life, paying the usual rent; but the next tenant "to pay 9*l.* a year." He then leaves, "to his trustee and executor, 30*s.* yearly out of the rents for repairs of the farm;"

and directs some specific repairs and improvements. " And " John Cooke, his trustee, to see that all be done according to " his will; to whom he leaves 5*l.* to build a tomb withall in " Tankersley church-yard; he and his heirs always to see that " it be kept in order. And his mind was, that if any of his " legatees shall take any monies, on account of their said legacies, they shall have nothing, but their legacies shall *be " divided among his other legatees; and that his estate shall " (if trouble shall arise) vindicate itself, so that no person shall " be at any expence whatsoever. And he constitutes John " Cooke before mentioned his sole executor and trustee of this " his last will; he paying all just debts, legacies, and funeral " charges. And desires, that the bed in the closet be left " there particularly for his trustee, that, when he pleaseth to " come over, he may lodge there without let, molestation, or " hindrance." 8th April, 1761, George Beaumont surrendered one of the tenements in question, being copyhold, to the use of his will, and died, leaving John Smith, John Parkin, Thomas Beaumont, and the lessor of the plaintiff, his nephews and heirs at law; and leaving a personal estate of 80*l.* and the premisses in question, viz. a copyhold of the yearly value of 30*s.*, and freehold of the annual value of 13*l.* 10*s.* *Qu.* What estate passed by the will to John Cooke, the executor and trustee, the defendant?

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This case was argued, by *Walker* for plaintiff, and *Fenton* for defendant. And for the defendant it was urged, 1st, That the annuities in fee, to be paid by the defendant, implied an estate in fee, (whether absolute or with a resulting trust for the heir is immaterial on the present action), because the estate must be commensurate to the charge; *Shaw* and *Weigh*, 2 Stra. 798 (t). 2dly, That the devise of an annuity to the heir at law, is an implied exclusion of the heir; 1 Wms. 472(v): And some of the annuitants (since dead) were his heirs when the will was made. 3dly, That charging the executor with the legacies implies an estate to pay them with; 6 Co. *Collier's* Case (u).

And of this opinion was the Court; and by Lord MANSFIELD, C. J.—If lands are given to an executor, *eo nomine* as an executor, it amounts to charging the real estate with the testator's debts in a Court of equity (w): Therefore such devises should be favoured.

Devise of lands to an executor, *eo nomine*, charges the estate with debts.

WILMOT, YATES, ASTON, Js., *accord.*

Plaintiff nonsuited.

(t) *S. C.* 1 Eq. Ca. Abr. 176. See *Goodright v. Allin*, post, 1041, and *Gibson v. Montford*, 1 Ves. S. 485.

(v) *Willis v. Lucas*; *S. C.* 10 Mod.

416: but see *Ros v. Bolton*, post, 1045.

(u) See *Frogmorton v. Holyday*, ante, 539, and n. (i), *ibid.*

(w) *Vin. Abr. Charge*, (D) pl. 7.

THE KING v. GUERCHY.

Noli prosequi on an indictment of an ambassador for an attempt to assassinate.

CLAUDIUS Lewis Francis Regnier Count de Guerchy, the French ambassador, was indicted in London, for soliciting one Peter Henry Freyssac de Vergy to assassinate M. D'Eon: Whereupon application was made to the Attorney and Solicitor-General for a *noli prosequi*, who removed it by *certiorari* into the King's Bench; and, desiring to hear counsel on both sides, were accordingly attended by *Blackstone*, for the defendant, and *Glynn*, Serjeant, and *Dunning*, for the prosecutors. (See p. 510(x)). It appeared, on inspection of the indictment and examination of Mr. Ford, clerk of the arraigns, that the facts, on which the indictment was founded, happened in Middlesex not in London—that he accordingly drew it with a Middlesex venue—that the prosecutor's agents altered it to London, and persisted in it, after notice a second time of the error—and that the indictment had, seven times, mistaken the names of the prosecutor and the defendant.

For the defendant it was therefore insisted, that these mistakes were voluntary, and the whole proceeding calculated merely to defame Count Guerchy, as the indictment could not be supported either in law or fact; therefore, to let it go to trial would serve no good purpose, but might have many bad consequences, in exasperating foreign courts, by a violation of the law of nations, which privileges an ambassador from such a prosecution. The *jus gentium* arises from natural reason, interpreted by the practice of all civilized nations, and, according to these, all jurisdiction is founded on the subjection of the party; and an ambassador owes no subjection to the Courts of the country to which he is sent. He is supposed, by a fiction of law, to be still resident in his own country. Grot. 2, 18, 4; Montesq. Spir. L., b. 26, c. 21(y). The Roman law, which hints the contrary, is interpreted by Bynkershoek, de Foro Legator. 460, 461, to be understood only of provincial deputies, not ambassadors from foreign states.—Tarquin's ambassadors, though engaged in a treasonable conspiracy, dismissed by the law of nations; Liv. 1. 2, c. 4(x); Bynk. 532.—Verres, when ambassador, ravished a virgin; yet unpunished. Cicero in Verr. 3; *Levius peccatum fore putabant, si homini scelerato pepercissent, quam, si legato non pepercissent*. Grot. 2, 18, 4; *Securitas legatorum utilitati, quæ ex pœnd est, præponderat*.—The Bishop of Ross, ambassador from Queen of Scots, though declared by the English civilians to be subject to punishment (which opinion is condemned, Bynk. 461); yet was dismissed at length(a); Camd. A. D. 1571, 1573.—Mendoza, the Spanish ambassador, concerned in Throgmorton's conspi-

(x) *R. v. D'Eon*.

(y) "Le droit des gens a voulu que les princes s'envoyassent des ambassadeurs: et la raison, tirée de la nature de la chose, n'a pas permis que ces ambassadeurs dépendissent du souverain chez qui ils sont envoyés, ni de ses tribunaux. Ils sont la parole du prince qui les envoie, et cette

parole doit être libre."

(z) "Proditoribus extemplo in vincula coniectis, de *Legatis* paululum addubitatum est: et quanquam vis sunt commissæ, ut hostium loco essent, jus tamen gentium valuit."

(a) A. D. 1571. Robertson's Hist. Scot. vol. ii, 1. vi, p. 28, 8vo.

racy; yet only sent home; Camd. *A. D.* 1584. Bynk. 535.—Don Pantaleon Sa, brother of the Portuguese ambassador, was indeed put to death by Cromwell for murder (*b*).—This only the case of an attendant, and Portugal was then in a very weak condition. It was condemned by the foreign jurists, and Cromwell himself was contented to dismiss a French ambassador, who conspired against his life; Bynk. 537.—In 1716, Count Gyllenberg, the Swedish ambassador, who conspired to depose George the First, was sent home to Sweden a prisoner. The confinement exclaimed against by foreign powers (*c*).

For the prosecutor it was said, that the imperfections in the indictment were no reason for a *noli prosequi*; for, if fatal, the defendant must be acquitted: and, if the prosecution be malicious, the plaintiff may have his action. As to the main question: Ambassadors are exempt from being punished for such particular species of treason as the interest of their princes may require; but are subject to the *jus gentium* and the penalties of universal law. They are not punishable for committing *mala prohibita*, but for *mala in se* they are. This the uniform opinion of all English writers; 1 Roll. Rep. 175; 4 Inst. 153; 3 Bulstr. 27; Molloy, 189; 1 Hal. 97; Foster, 188 (*d*). Foreign writers are no authority here. * Bomilcar, the Carthaginian ambassador, was found guilty; [* 547] Sallust. Bell. Jugurth. (*e*). Henry 8th imprisoned an ambassador for intrigues against Cardinal Wolsey; Moll. 135. Lord Cottington questioned in Spain; Lord Clar. Book 5. The Bishop of Ross was imprisoned two years. Don Pantaleon Sa actually executed. Count Gyllenberg arrested; but it ended, according to Voltaire, by a compromise between the two courts. Count Goertz, in Holland, was imprisoned by order of the States for being concerned in the same conspiracy merely against a prince in amity with the States.

The *noli prosequi* (*f*) was granted.

(*b*) *A. D.* 1654, Hume's Hist. Eng. vol. vii, ch. lxi, p. 237, 8vo.

(*c*) Smollett's Hist. Eng. Geo. I, c. 1, p. 345, 8vo.

(*d*) See also 1 Bla. Com. 253; Vin. & Bac. Abr. Ambassador; Com. Dig. Id. (B). As to their privilege from arrest, see *Pottier v. Croza*, ante, 48.

(*e*) "Fit reus magis ex equo bonoque,

quam ex jure gentium Bomilcar, comes ejus (scil. Jugurthæ) qui Romam fide publica venerat."—"Sicuti igitur legati, vel qui fide publica venerunt, ita et comites, et vasa legatorum sui generis sanctimoniam habent, sed accessorie."—Grotius.

(*f*) *R. v. Crummer*, 1 Lord Raym. 721, 12 Mod. 647, *S. C.*

The KING v. University of CAMBRIDGE.

S. C. 3 Burr. 1647.

IN last Trinity Term, *De Grey*, Solicitor-General, moved for a *mandamus* to the Keepers of the Seal of the University of Cambridge, to set the common seal of the University to an appointment of Philip, Earl of Hardwicke, to the High Stewardship, in the room of his father, deceased: upon affidavits, "That, by the custom of the University, the election must be made by a majority of the voters, in both the regent and non-

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regent houses (g); that the Earls of Sandwich and Hardwicke were competitors: and that the Earl of Hardwicke had a clear majority of 103 to 101 in the non-regent house, and afterwards was proposed to the regent house, when (after rectifying a small mistake between the two Proctors, who were Scrutators there) the numbers of *placets* and *non-placets* to Lord Hardwicke's grace appeared to be equal, viz. 108 each: that, after some altercations, the Vice-Chancellor dissolved the congregation; and afterwards it was discovered, that Mr. Thomas Pitt, who, by his standing, ought to have voted among the non-regents, voted among the regents as *non-placet*; which vote being subtracted, there was a majority of one in favour of Lord Hardwicke." Lord MANSFIELD directed the rule to shew cause why a *mandamus* should not issue to the Vice-Chancellor to hold a congregation to receive the declaration of the Proctors in *respect to the majority; to the Proctors to declare how the majority stood; and to the Keepers of the Seal to affix it to Lord Hardwicke's nomination: and that notice be given thereof to the University and Mr. Thomas Pitt.

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After many enlargements of the rule, cause was shewn this Term, by *Norton*, Attorney-General, *Morton*, and *Blackstone*. 1. Because a *mandamus* can't go to officers out of office, for they cannot exercise the necessary powers required of them. The Vice-Chancellor, Proctors, and Keepers of the Seal, all changed in last Michaelmas Term. And though the other officers might do the ministerial acts required, yet the new Proctors cannot declare what majority there was upon a scrutiny previous to their office. 2. That the congregation being dissolved, *re infecta*, the business must now be resumed *de novo*. 3. That admitting unqualified persons to vote at all in a secret scrutiny ought to vitiate the whole election, if any thing: but that the poll is the only proper evidence, which is taken by the Proctors by a scratch with a pen on a paper, after privately asking the vote. Therefore no man can give positive evidence of another's vote but the Proctors, who are sworn to secrecy; and though one of them has divulged Mr. Pitt's vote by his affidavit, this ought not to be received. 4. If the votes were equal, Lord Hardwicke had no majority, and by the usage of the University the grace is then rejected. 5. If the Court is at liberty to examine into particular votes upon a secret scrutiny, then, if we either establish Mr. Pitt's, or disqualify one on the other side, the question is with us: we think we can disqualify five. 6. The objection to Mr. Pitt is, that though he took the degree of A. M. 17 July, 1758, yet it being by royal mandate, he was esteemed to be regent immediately, and so was above five years' standing regent on the day of election, * (30 March, 1764), and should therefore have voted in the non-regent house. We say, that he was not complete

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(g) Masters of Arts of less than five years' standing, and Doctors of less than two, compose the Regent or Upper House; all the other members of the senate com-

pose the Non-regent or Lower House.—Doctors of more than two years' standing and the Public Orator may vote in either house, at their pleasure.

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regent till the Commencement, in July, 1759, because not subject to exercises till that time, and therefore voted in the right house. 7. We object to the votes of two Bedells, who, though of long standing, voted in the regent house; and of three non-regent Masters, who resumed their regency by a special grace, and voted in the regent house. 8. By c. 40, of Queen Elizabeth's statutes, all elections are to be performed in a different mode, except of the officers therein excepted. The High Steward is not included in the exception: therefore his election by grace is void.

Yorke, De Grey, Solicitor-General, and Ashhurst, in support of the rule. 1. The rule originally prayed is only to the Keepers of the Seal. The facts disclosed will warrant such *mandamus*: which cuts off the four first objections. 2. Mr. Pitt paid his fees, and was dispensed with from duty, 17th July, 1758, which shews he was then a regent; and so is the general sense of the University. 3. The Bedells must attend the Vice-Chancellor, who votes in the regent house. Sir James Burrows (who died about two years ago) voted so all his time. Resuming regency is warranted by the usage of the University. 4. That the statutes of Queen Elizabeth begin with officers of inferior rank, and cannot therefore extend to the High Steward, who has been elected by grace for 240 years past, and no instance to the contrary.

Lord MANSFIELD, C. J.—The original application was only for a *mandamus* to the Keepers of the Seal to affix it to Lord Hardwicke's nomination. Three were ready to do it, two refused; and unanimity is necessary for this purpose. On a second application all refused, upon this special reason,—because the question was likely to be litigated. The Court therefore suspected, that either the *mandamus* would be issued to *will- [*550]
 ing persons, and that by their collusion the rights of third persons might be affected, or that, in case of refusal by a difference of opinion among the Keepers, an attachment might be necessary against them all. We therefore desired, that the merits might be gone into very fully; that the nature of the question might not be changed by putting the officer into possession; and directed notice to be given to the Vice-Chancellor, the two then Proctors, the corporate body, and Mr. Pitt, that any of them might be heard upon the question if they thought proper. The University (as a body) does not oppose the rule; but two of the Keepers of the Chest, and near half of the individuals, do oppose it.

There are three questions.—1. The right to the office: whether Lord Hardwicke is duly elected. 2. Whether a *mandamus* is the proper remedy in this case. 3. How it should be directed, if granted.

1. There is no contrariety in the witnesses. The mode of election has been traced back (in respect to this office) by entries in writing to 1524, and may have existed 400 years before. The mode has always been by grace, passing, 1. The Caput; 2. The Non-regents; 3. The Regents. It was not contended by any of the parties at the time, that this was not the mode

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of election. It is now the objection of counsel at the bar, founded on c. 40, of Queen Elizabeth's statutes. There is a difference between statutes given by the Crown to one of the Universities, and the charter of a common corporation. The Crown did, in fact, formerly exercise a power over the Universities, which cannot be supported by any sound principles of law. It is now most certain, that those corporations are lay incorporations^(h); and that the Crown cannot take away their rights, nor give them statutes or charters without their own voluntary acceptance; as was the case between Charles I. and the University of Oxford. The University may accept in part, or (if they please) re-enact any part of the statutes given them by the Crown; and that acceptance may be proved by *usage. Queen Elizabeth's statutes did not mean to repeal all former statutes and constitutions. Many things are not provided for by those statutes, as the case of degrees by mandate, the Vice-Chancellor's and Proctor's right of voting in the regent house, &c. Therefore I think, that c. 40 of those statutes does not relate to the election of the High Steward, but to certain inferior officers only; whereas this is an ornament, a feather, and not then in the Queen's contemplation. Besides no objection was made to the grace at the time. So much for the form; now as to the merits of the election. There is no imputation upon the fidelity of either of the Proctors. A second scrutiny was for some time insisted on because of a supposed mistake, one Proctor returning 108 *placets* and 107 *non-placets*; the other 107 *placets* and 108 *non-placets*. On examination the mistake was discovered: the Proctors, being of different parties, had each set down his own vote, and not his brother Proctor's. They declared the votes equal. No second scrutiny could be had because some of the voters were gone away. Not a single person then thought of Mr. Pitt's vote: and in the hubbub the congregation was dissolved. Lord Hardwicke now says, "that a stranger intruded; and therefore, if I can "set him aside, I have a majority of one upon the Proctor's "declaration." This depends on Mr. Pitt's right of voting in the regent house. If the inauguration or commencement (as to him) is to be computed from the 18th of July, 1758, and the five years' regency to be computed from thence, he had no right: If it is to be computed from the next commencement in July, 1759, his vote was good. All the affidavits for the motion agree, that in *mandamus* degrees the time of regency has been usually computed from the day of the creation: this not contradicted by the other side. But other circumstances are alleged, from which each side draws their own conclusion. 1. He had leave of absence granted according to custom, 17 July, 1758. This is strongly with Lord Hardwicke. 2. He paid 6s. 4d. in October, 1758, for his turn of *diss'ing* (or disputing in the schools). 3. The paper made out annually by the Register

(h) *Ante*, 90, n. (h). See 3 Burr. 1656; 6 Vin. Abr. *Corporation*, (13), and 2 Supplement, *Ibid*; and *post*, 591.

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and Proctors, called *ordo senioritatis*, is strongly relied on on both sides. Now there *appears to be two of these papers: one made out without the names of the noblemen or *mandamus* degrees, merely to call up the Masters of Arts at the next commencement for creation: The other, with their names inserted, for the purpose of *diss'ing*, which includes all persons whatsoever created since the commencement in 1758. This a strong argument, that the regency of these royal *mandamus*-men did commence from the day of their admission. If so, there is a majority of one for Lord Hardwicke, unless the opponents can disqualify others on his side. They have pointed at five others: one would serve the turn. 1st. The resumed regents: usage and utility are on their side, and there is no contrariety of evidence in this respect. 2dly. The Bedells, who swear they have used to vote in the regent house: Nobody contradicts it. The reason given for it by the Bedells (though there was no occasion for any reason) is a very natural one; their attendance on the Vice-Chancellor. So stands the right of election.

2. Whether a *mandamus* is the proper remedy. No other has been suggested: And, if there is no other, then this Court is bound to interpose by the prerogative writ of *mandamus*, if the office be of consequence and value. If the steward is to hold a Court Leet, it is admitted it may go; but it is said, the University have none. The contrary is sworn, and not contradicted upon oath, and there are entries of such a court, so long ago as 1692. But it is improper to go into that question in this collateral way. The town of Cambridge may interpose in another manner, if they contend, that the University has not the Court Leet. And even if there were no leet, it is proper for this Court to grant the *mandamus*; because there is a salary annexed to this office, and the officer has no other remedy. So we grant a *mandamus* for possession of a chapel or a meeting-house (i); but not of a parochial church, because there is another specific remedy.

Mandamus necessary for offices of consequence or value, if there be no other remedy.

3. How the *mandamus* is to be directed. It did occur to me, that a declaration of the majority by the Proctors might be necessary to prove the election: therefore the rule was granted that way, because it could do no harm, and that part might be omitted on shewing cause, if found to be unnecessary. *As [*553] the facts are now disclosed, the *mandamus* must issue on the foot of its being a due election. The Proctors have declared the numbers equal. Since that a stranger's vote is discovered: the Proctors have no more to do. If they had even declared contrary to the truth, the party injured, proving the fact, might come to this Court, and demand admission upon the right of election. It ought therefore to go to the Keepers of the Seal for the time being by the description of their office (k). The rest of the rule must be discharged.

(i) *R. v. Barker*, ante, 300, 352.

(k) *Mandamus* to the warden of a college to affix the common seal to an answer in Chancery; *R. v. Windham*, 1 Cowp.

377;—to a mayor and alderman to affix the corporate seal to a certificate of the election of a recorder; *R. v. Mayor of York*, 4 T. R. 699.

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WILMOT, YATES, ASTON, Js., of the same opinion. Accordingly the *mandamus* went, and was obeyed.

TRINITY TERM,—5 GEO. III. 1765.—K. B.

THE KING v. SAINT LUKE, MIDDLESEX.

S. C. Burr. Sett. Ca. 542.

Apprentice dismissed, without cancelling the indenture, gains no settlement by a subsequent service with another master, so long as the term continues.

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STOWE and Lane moved to quash an order of Sessions, confirming an order of two Justices, which removed William Hutchins, Mary his wife, and their two children from St. Leonard Shoreditch to St. Luke Middlesex; on this special case. William Hutchins the pauper, at the age of 15, was apprenticed by the parish of St. Peter's Cornhill, to one Frost a shoemaker in Southwark, till the age of 24. He served there three years. The master then removed to St. Luke, taking the pauper with him, where he served four years. The master then told the pauper he might go about his business, and work for himself; no one else being present at the time: but the indentures were not cancelled or delivered up. The pauper afterwards hired himself to several masters of the same trade as a journeyman in different parishes, but Frost never knew what master he worked with after he left him; nor was he ever called upon, nor did [he] ever account with Frost for what he earned, nor did Frost ever make any provision for him after he had so left him. The pauper worked and lodged the last forty days before he attained the age of twenty-four, in St. Leonard Shoreditch.

Norton, Attorney-General, and Jones shewed cause. And

By Lord MANSFIELD, C. J.—The whole turns upon the indenture of apprenticeship continuing. It is agreed on both sides, that it did continue. There is a strong case (cited at the bar) in 1 Mod. 190 (l); a father, to whom his son was apprenticed, gives up the indenture: Held not to destroy the apprenticeship, because the indenture [was] not cancelled. This case is not so strong as that. It was humane in the master to let the apprentice work for himself after seven years' service, but that does not destroy the legal effect of his binding.

WILMOT, J.—I think the pauper continued an apprentice to all intents and purposes, and was incapable of gaining a fresh settlement by service, &c. as not being *sui juris*. The only question that could be made is, whether such a general consent of the master can operate as an assignment of the apprentice to another particular master: for that would carry on the service of the first master, and settle the pauper in St. Leonard Shoreditch. But this general dismissal is a total dissolution of the apprenticeship, so far as entitles the master to any future service. It is not carrying on the business of the master.

(l) The editor has not been able to find the case here referred to.

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YATES, J.—No person can gain a settlement by a service, which he was not capable of hiring himself to. The master might have revoked his consent, and called him back at any time. There is no privity between the first master and the second. I think the settlement is where he last served under the apprenticeship for forty days.

ASTON, J.—The difficulty has arisen from the apprentice's happening to have hired himself to one of the same trade. Had it been another trade, no man could have entertained a doubt.

LORD MANSFIELD, C. J.—This is no service to the master, nor an assignment of the apprentice. But the indenture continues, and disables him from gaining another settlement.

Per tot. Cur.—Orders confirmed (m).

(m) So where the master being dead, the widow told the apprentice he must not stay with her, and that he was at liberty to work where he thought proper; upon which he served two years in C.: he did not gain a settlement there; *R. v. Chirk*, Burr. S. C. 782; indeed in that case she had not taken out administration, and had not any interest; as to which point, see *R. v. Barnsley*, 1 M. & S. 377. So where the master said he had no further employment for him, he might go where he pleased; *R. v. Crediton*, 1 East, 59. So where a person told the original master that he had got his apprentice at work, to which the latter replied, "I am glad of it, he was a bad lad, and I could make nothing of him;" *R. v. St. Helen, Stonegate*, 1 East, 285. So where the master having quitted business, his apprentice hired herself as a servant for fifty-one weeks, and her master afterwards expressed his approbation at her having gone into that particular service, she did not gain a settlement by such hiring; *R. v. Ashby-*

de-la-Zouch, 1 B. & A. 116. So where the master on the application of the mother consented to give the apprentice up; and accordingly the apprentice went away, but the indentures being in the hands of a third person were not given up; it was held that he was not *aus juris* so as to acquire a settlement by hiring and service, although the master said, he would have given up the indentures, if he had had them in his possession, and refused to take back the apprentice; *R. v. Skeffington*, 3 B. & A. 382. So where an apprentice hired himself to A. B. for a year, in C., at certain wages, then returned and told his original mistress, who said, "Very well, she was not against it," and then went and lived with A. B. for three months, he did not gain a settlement in C.; *R. v. Whitchurch*, 2 Dowl. & R. 845; S. C. 1 B. & C. 574. See also *R. v. Bow*, 4 M. & S. 383, where most of the cases are referred to; and *Ecclesal Bierlow v. Warslow*, post, 592; *R. v. Tavistock*, post, 635.

MONEY and Others v. LEACH.

S. C. 3 Burr. 1742; 19 How. St. Tr. 1002.

ERROR from Common Pleas. Action of trespass and false imprisonment, for breaking and entering the house of the defendant in error (the plaintiff below) and imprisoning him for five days, without any reasonable or probable cause. The defendants below, now plaintiffs in error, pleaded the general issue, and also a special justification, stating his Majesty's speech, 19th April, 1763, and the North Briton, No. 45 (n),

General warrants are illegal and void.

(n) This celebrated No. 45 has given rise to many reported cases besides the present one. See the report of a similar action, *Huckle v. Money*, 2 Wils. 205. John Wilkes, Esq., the author, was arrested by a general warrant from the Secretary of State, April 30th, 1763, but being

brought up in C. P. by *habeas corpus*, he was discharged as being a Member of Parliament; *R. v. Wilkes*, 2 Wils. 151, 19 How. St. Tr. 982, S. C. An information was afterwards exhibited against him as the author of that Number, on which he was found guilty and sentenced to pay a

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Bill of excep-
tions.

23d April, 1763, highly reflecting on the same, and published by one John Wilkes:—That the Earl of Halifax was then Secretary of State, and a lord of the Privy Council; and, upon information given him of the said libel, and producing the same before him, 26th April, 1763, he issued his warrant (o) in writing, under hand and seal, to the defendants and another, being four of his Majesty's messengers in ordinary, requiring them (taking a constable to their assistance) to search for the authors, printers and publishers, of the said seditious and treasonable libel, and to apprehend and seize them, *together with their papers*: That the plaintiff Leach was a printer, and had printed some former numbers of the North Briton (stating them): That, on 27th April, 1763, the defendants had information, that he was the printer of No. 45; and therefore they, with *one Thomas Freeman a constable, did enter the plaintiff's house, the door being open, and search for the printers of the said libel: That they found the plaintiff and his servants reprinting a new edition of the North Briton; whereupon they took him into custody, and kept him four days, till the Earl of Halifax had leisure to examine him: and then, it appearing that he did not print the said No. 45, he was discharged; which are the same, &c.—Leach replies, *de injuriâ suâ propriâ absque hoc, &c.* And thereupon, and upon the general issue aforesaid, issue was joined, and came on to trial, before Pratt, C. J., 29th November, 1764, at Guildhall: At which time a bill of exceptions was tendered by the defendant's counsel, and on 10th December following, was sealed by the Chief Justice; stating the proof of the facts in the declaration, and "that the counsel for the defendants, in order to acquit defendants under the general issue, did prove the King's speech, libel, office of Lord Halifax, information, and warrant to the defendants being his Majesty's messengers (as before stated in their justification), and that it was the long and frequent usage of office to grant and execute such warrants; that they had such grounds of suspicion, and did such acts, &c. as are stated in the said plea;—and that it was proved, that plaintiff was not the author, printer, or publisher, of the said paper, No. 45. Whereupon the counsel for the defendants insisted on the benefit of the stat. 24 Geo. 2, c. 44, for indemnifying constables, &c. acting in obedience to the warrants of justices of the peace; and that the matters aforesaid were conclusive evidence (p), for that purpose and to bar the action of the plaintiff. The counsel

fine of 500*l.*, and to be imprisoned for ten calendar months; *R. v. Wilkes*, 4 Burr. 2527, 2574, 19 H. S. T. 1075, 1124: which was afterwards affirmed in Dom. Proc. *Ibid.*, and 4 Bro. P. C. 360 (Toml. ed.). The record of the proceedings on this information, containing his Majesty's speech, the No. 45, the conviction, outlawry, proceedings in error, and reversal of the outlawry, &c. is inserted in 19 H. S. T. 1382, together with other papers relating to that affair. Mr. Wilkes also brought an

action against R. Wood, Esq., for breaking and entering his house, who justified under the general warrant of the Secretary of State: the plaintiff had a verdict for 1000*l.* damages; *Wilkes v. Wood*, Loft, 1, 19 H. S. T. 1154, S. C.

(o) See the form, 3 Burr. 1747, Bull. N. P. 317.

(p) *Chichester v. Philips*, T. Raym. 404, T. Jones, 146; *Moctyn v. Fabrigas*, 1 Cowp. 161; Bull. N. P. 315.

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for the plaintiff insisted, that neither the defendants nor the Earl of Halifax were within the meaning of the stat. 7 Jac. 1, c. 5, (which allows justices and other officers, to give the special matter in evidence on Not guilty), nor of 21 Jac. 1, c. 12, making the former perpetual, nor of 24 Geo. 2, c. 44 (*q*), nor entitled to the benefit thereof: And that the seizure and imprisonment of the plaintiff were not made or done in obedience to the said warrant, nor had the defendants any authority thereby: That the Chief Justice declared his opinion, that the said matters were not sufficient to bar the plaintiff's *action, and, with that direction, left the same to the jury, who found a verdict for the plaintiff on both issues, with 400*l.* damages." Upon which error was brought in this Court (*r*).

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De Grey, Solicitor-General, for the plaintiff in error, made three points: 1st, That, under the stat. 7 Jac. 1, c. 5, the defendants had a right to give the special matter in evidence on their plea of Not guilty; or, in other words, that Lord Halifax was a justice of peace under the equity of that statute. 2d, That the special matter so to be given in evidence was a sufficient justification, which includes the legality of the warrant, and the manner of its execution. 3d, That the defendants, being officers in the execution of justice, were excusable, even if the warrant was illegal, the plaintiff not having pursued the directions of stat. 24 Geo. 2, c. 44.—1st, Before Edw. 3d. there were different species of justices (*s*). The great officers of state were so, as being incidental to their offices. Secretaries of State are certainly conservators of the peace, *ex necessitate rei*, being officers as old as the Crown. The statute Edw. 1st., commented on by Lord Coke, 2 Inst. 556, refers to the seal in custody of the principal Secretary: the seal is as old as the Crown: the Secretary as old as the seal. They have great powers by prescription, recognized by the Courts of law, in treason, felony, and even misdemeanors. The present misdemeanor is a crime against the State. Private defamatory libels are no otherwise public offences than assaults and batteries are, but seditious libels are immediately levelled against the existence of government. In *K.* against

(*q*) S. 6, which enacts, that no action shall be brought against any constable, headborough, or other officer, or person aiding him, for any thing done in obedience to any warrant of a justice of peace, until demand hath been made of the perusal and copy of such warrant, and refused: And in case, after such demand and compliance, any action shall be brought against such constable without making the justice defendant, on producing such warrant at the trial, the jury shall find for the defendant, notwithstanding any defect of jurisdiction in such justice.

(*r*) Whereupon a writ issued to *Pratt*, C. J., commanding him to appear personally in K. B., "wheresoever, &c."

to confess or deny his seal to the bill of exceptions; which he accordingly did, and confessed his seal: see the form of the writ, *S. C.* 3 Burr. 1693, and *Rast. Ent.* 393 b. If the judge deny his seal, the plaintiff in error may take issue thereupon, and prove it by witnesses; 2 Inst. 428. See *post*, 679.

(*s*) Justices of the peace have power to arrest and commit persons charged with publishing libels; *Butt v. Conant*, 1 Brod. & B. 548, 4 B. Mo. 195, where the authorities relating to the origin and power of justices of the peace are referred to. See also *Com. Dig. Justice of Peace*, (A); *Bac. Abr. Id.* (B).

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Kendal and *Roe*, 5 Mod. 84, Comb. 343, Salk. 347 (t), the Case of Secretary *Trumball*: held incident to the office of Secretaries to commit (v). So *Qu.* and *Darby*, Fortesc. 140 (u), and the *King* and *Earbury* (w), 1733, coram Lord *Hardwicke*, C. J.; the defendant was seized, by a Secretary's warrant, with his papers: Motion to be discharged with his papers: Held, that he could not be discharged, nor his papers restored upon motion. See *Barnardiston* for the fact only. From 1 Ed. 3, to 2 Hen. 5, the magistrates were called only wardens, conservators, and commissioners of the peace. In Hen. 5th's time, called justices, because then made justices of *Oyer* and *Terminer*. Conservators therefore are still kept on foot, and the modern justices have half their authority merely as conservators. They hold Sessions as justices: they apprehend merely as conservators; *Kelynge*, 76; 2 Roll. Abr. 95, caption of indictment need not call them justices. It is reasonable, that all conservators by prescription, as the Master of the Rolls confessedly is, should have the benefit of the statutes in question. Stat. 2 H. 5, c. 4, justices of the peace shall be resident in their shires,—except lords named in the commission, and the justices of Westminster-Hall. There are therefore some justices not named in the commission. The intention of all acts of Parliament must govern their interpretation: *Plowd.* 366; *Co. Litt.* 24 b; 10 Rep. 101 b; *Plowd.* 147; *Plowd.* 36; *Bro. Parl.* 20; *Wentw. Exec.* 67; *Plummer* and *Whichcote*, T. Jones, 62. And in *Moor*, 845, *Phepys* and *Winchcombe*, though a deputy constable is not named in stat. 7 Jac. 1, yet held to be within it.—2d, Whether the special matter is a sufficient justification, exclusive of the statute 24 Geo. 2. Objections to the warrant are: 1. That it is uncertain as to person: 2. Unlimited as to power. It is no objection to the legality that it is capable of being abused. It is a prescriptive power. It has constantly been used, as far as records will reach. It must therefore be presumed to have been always used beyond the time of memory. No judicature can subsist, if a possibility of abuse, and of a time when it did not exist, be allowed to shake it. Usage establishes a right: *K.* and *Bewdley*, 1 Wms. 207; *India Co.* and *Skinner*, Comb. 342; 6 Mod. 179. The very jurisdiction of the Courts at Westminster depends on usage; as in case of *quo minus, ac etiams*, ejections, new trials, &c.—Similar warrants have been brought before this Court for a century past, and never dis-

(t) *S. C.* 1 Ld. Raym. 65, Holt, 144, Skin. 596, 12 Mod. 82, 12 How. St. Tr. 1299.

(v) *S. P. Howell's Ca.*, 1 Leon. 70; *Helyard's Ca.*, 2 Leon. 175, which were commitments by a Secretary of State: but in both cases the return to the *habeas corpus* was held insufficient for not stating the cause of commitment; *Yazley's Ca.*, Carth. 291, Salk. 351, Comb. 224, Skin. 369, *S. C.*; *R. v. Erbury*, 9 G. 1,

8 Mod. 177; *R. v. Despard*, 7 T. R. 742. *Per Lord Kenyon*, C. J.: "Secretaries of State are allowed the power of commitment in order to bring offenders to trial;" 1 Bla. Comm. 338. See also *Beardmore v. Carrington*, 2 Wils. 244; *Entick v. Carrington*, Id. 275, 290, 19 How. St. Tr. 1030, 1045.

(u) 19 How. St. Tr. 1014, n. *S. C.*

(w) 7 G. 2, *W. Kelynge*, 161, 2 Barnard. 293, 346.

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allowed. And yet, 1 Hal. 578, it is incumbent on the Court *to discharge persons brought before them on illegal warrants. The very resolution of the House of Commons, in Sir *John Elliot's Case* (x), was, that such warrants were a breach of privilege, not that they were illegal. As to the seizure of papers: that must be allowed in many cases, and this as strong as any. It is true, no person can be compelled to produce evidence against himself; but evidence may be produced from a man's self. The officer seizes at his peril: if nothing material is found, he is answerable to the party; otherwise not: therefore no danger of abuse. 3d. The statute, 24 Geo. 2, is alone a sufficient bar to this action. For no action can be brought against a constable or inferior officer, unless a copy of the warrant have been previously demanded, and the name of the magistrate be joined in the action. But nothing of this sort has been done in the present case.

Dunning for defendant in error.—The sole question is, whether this case is within the statute 24 Geo. 2; for that involves the questions on 7 & 21 Jac. 1. Consider, 1. Whether Lord Halifax was a justice of peace: 2. Whether messengers are constables, headboroughs, &c.: 3. Whether the present action is brought for any thing done by a justice of peace. 1. Secretaries of State are not justices, strictly taken. I allow, they may commit for high treason (y): so held in *Kendal* and *Roe*; doubtless upon good reason, though what that reason is, does not appear. They are not conservators of the peace, though of similar authority in case of high treason. The conservatorship not incident to the office of secretary or privy counsellor. What powers they have, already established by law, are founded merely in prescription. But the power now claimed is not pretended to be older than the revolution. The statute, 24 Geo. 2, begins with officers inferior to the Secretaries of State; therefore cannot extend to them. In the *King* and *Loxden* (z), an appointment of five overseers was held *to be bad, because the statute begins with number 4, and proceeds downwards. The mischief intended to be remedied by the act appears in the preamble. Not a word of secretaries or messengers there. Not in the contemplation of the Legislature. 4 Inst. 175, in margin, held that statute, 7 Jac. 1, does not extend to officers not named in the act. 2. Messengers are not recognized by any law as officers for the execution of justices' warrants. 3. This warrant, if good, is to apprehend the author, printers, and publishers of the North Briton, No. 45. The plaintiff is confessedly neither. The probable cause of suspicion alleged is founded neither on fact nor law. As to the validity of a general warrant to seize authors, &c. with their papers, it cannot be supported by usage, unless that usage is general to all magistrates, and not confined to this particular

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(x) 3 How. St. Tr. 293.

(y) They may commit for treason generally, *R. v. Wyndham*, 1 Stra. 3, S. C. cited Andr. 272; Vin. Abr. *Bail*, (H a),

pl. 7; S. C. 2 Hawk. P. C. c. 16, s. 4.

17. So they may commit for treasonable practices; *R. v. Despard*, 7 T. R. 734.

(z) Or *Londale*, 1 Burr. 445.

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officer. And that it is not good when issued by a common justice of the peace, see 1 Hal. P. C. 580, Justice *Swallow's* Case; 2 Hawk. c. 13, sect. 10; 1 Hal. 586. Lord Chief Justice *Scroggs's* general warrants were made a ground of parliamentary impeachment.

De Grey, Solicitor-General, in his reply, cited Sir *Richard Coxe's* Case, Vaugh. 111.

Lord MANSFIELD, C. J. — What is a probable cause of suspicion, and what is a reasonable time of detainer, are matters of fact to be determined by a jury. The question of law on the bill of exceptions is, whether, supposing both these facts, the messenger can justify taking a man who is not the actual publisher under the present warrant, and can give the special matter in evidence upon a plea of Not guilty. The privileges given to justices, by the statutes relied on, are only given them in their capacity of conservators of the peace; not as Judges of the Court of record; for what they do there can never be the ground of an action (a). *The questions arising out of this general one are four.—1st. Whether the Secretary of State is, *virtute officii*, a conservator of the peace. On this, I have as yet formed no opinion (b). 2d. Whether the messenger is a legal officer to execute warrants. This is consequential to the first. 3d. Whether the fact complained of was done in obedience to the warrant. To make out this it must be considered, whether it be not sufficient, that the officer have strong probable evidence of the identity of the person taken up. Conclusive evidence is not to be expected; for nothing can be so till the trial. On this question further light may be thrown upon another argument. In the common case of search warrants the words are, “to take up all loose and disorderly persons;” not “such as are suspected to be such.” Yet if a good ground of suspicion be shewn, it has always been held a sufficient defence. So the words of the writs of assistance in the customs and excise are equally general; yet a probable suspicion will justify acting under them (c). 4th. Whether the warrant itself is valid. I will lay out of the case what relates to the *papers* (d): it is not before us in this cause. As to the rest, I have a clear opinion upon the point, and will therefore ease the further argument of this part of the case. I ground that opinion upon the single point of uncertainty with respect to the person's not being named or particularly described.

The common law gives authority to arrest without a warrant in many cases, as where the offender is taken with the mainour.

(a) 2 Hawk. P. C. c. 13, s. 20; *Holroyd v. Breare*, 2 B. & A. 473.

(b) “The Secretary of State is no conservator, nor a justice of the peace, *quod* secretary, within the words or equity of the statute 24 G. 2, admitting him (for argument's sake) to be a conservator;” *per Cur.*, 3 Wils. 290; see also Lord Camden's judgment, 3 C. 19 How. St. Tr. 1045, where the character and authority of a Secretary of State is discussed at length;

and Com. Dig. Officer, (E 8).

(c) *Samuel v. Payne*, 1 Doug. 359; 2 Hawk. P. C. c. 13, s. 11; 1 Hale H. P. C. 579, *et seq.*; Com. Dig. Imprisonment, (H 6, &c.); Bac. Abr. Constable, (D); Vin. Abr. *Id.* (F). See also *Bostock v. Saunders*, *post*, 912, and the cases there referred to.

(d) 2 Wils. 291; 19 How. S. T. 1063, 1074, *ad finem*.

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Acts of Parliament often give it. But it is not contended in the present case, that the common law gives a power to apprehend without a warrant; nor is there any statute that relates to it. The question depends therefore on the general law. And I am of opinion, that it is not fit, either upon reasons of policy or sound construction of law, that, where a man's being confined depends on an information given, it should be left to the officer to ascertain the person. The *magistrate alone should judge of the ground of suspicion. Lord Hale and the other cited authorities all agree, that the warrant is void. How do the ordinary magistrates, who are conservators of the peace, usually act in such cases? It is not contended that they can issue such a warrant. If the Secretaries act in that capacity, the law must be the same, unless a different reason can be assigned. It is said that usage will justify it, and it appears, that the same form subsisted at the Revolution and has been continued ever since. Usage has great weight, but will not hold against clear and solid principles of law, unless the inconvenience of overturning it would be of very ill consequence indeed, as was the case in the *King* and *Bewdley*. But where no great inconvenience can arise in respect of what is past, and the consequence with regard to futurity may be very great, there is no reliance to be had upon such an usage. Besides, usage must be general and allowed;—*usitata et approbata*.—But this has been an usage of only one office and officer against the practice of all other conservators of the peace. The form of the warrant probably took its rise from a law (for licensing the press)(*e*), which is law no more: it arose from a law, which is now expired. At the expiration of that law the form of office was not varied, and so the warrant has continued to this day. The argument drawn from holding persons to bail in this Court, which have been apprehended upon such warrants, is of no validity; because, wherever bail is offered and accepted, the Court never looks upon the warrant, and it would be idle in such a case to take exceptions to the warrant, because the party might be arrested *de novo*. But usage, though it will not change the law, is yet conclusive evidence in favour of the magistrate who grants such a warrant, if accused of malice or partiality merely from the illegality of the warrant.

WILMOT, J.—I have not the least doubt, nor ever had, that these warrants are illegal and void.

YATES, J.—So totally bad, that an usage, even from the foundation of Rome itself, would not make them good.

ASTON, J.—I am of the same opinion, that this is a void and illegal warrant(*f*).

*In the next Term, *Yorke*, Attorney-General, was to have argued for the plaintiff in error, but declined it, as not being able to get over the objection, that the defendants in error

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(*e*) 13 & 14 C. 2, c. 33, in the Appendix to Ruffhead's Statutes, vol. IX, p. 190.
(*f*) See also Lord Camden's judgment in *Huckle v. Money*, 2 Wils. 205; *Entick*

v. Carrington, 1d. 275, 19 H. S. T. 1030, and a note at the end of that case, 1d. 1074; *Wilkes v. Wood*, 1d. 1154; *Lofft*, 1.

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son, not justifi-
fiable by stat.
24 Geo. 2.

were not the authors, printers, or publishers of the libel. And he mentioned a case before Lord MANSFIELD, at the Norfolk Assizes, 1761, where an officer, executing a warrant of a justice of Norfolk at large in the county of the city of Norwich, was held not to be justifiable under the stat. 24 Geo. 2. And the Case of *Dawson and Clerk*, at the Middlesex Sitzings, where, under a warrant to take up loose and disorderly persons, the constable took up a woman of character; and held that he could not justify.

Lord MANSFIELD, C. J.—The act of 24 Geo. 2 (g) was meant to make the justice liable instead of the officer. Where, therefore, the officer makes such a mistake, as will not make the justice liable, the officer cannot be excused. The Case of *Dawson and Clerk* seems to conclude fully to the present case. This is a warrant to take up the authors, printers, and publishers; and the messengers have taken up persons who fall under none of those descriptions (h).

Judgment was affirmed.

(g) S. 6; ante, 556, n. (g).

(h) So where a constable executes a warrant out of his hundred, which is not directed to him by name, but to "all officers of the peace within the county," he is out of the protection of the statute; *Blascher v. Kemp*, 1 H. Bl. 15, n. (a): see also *Prestidge v. Woodman*, 1 B. & C. 12, 3 D. & R. 43. So if it be directed to the constables of —, in a county where the magistrate has jurisdiction, and they execute it out of the county, they are not protected; inasmuch as it is directed to be executed within his jurisdiction: but if he had directed it to be executed out of his jurisdiction, they would have been protected by it; *Milton v. Green*, 5 East, 233; see also *Jones v. Vaughan*, Id. 445. So if officers exceed the authority given them by a warrant, as if in executing a distress for a poor's rate they break and enter a dwelling-house, &c., they are trespassers *ab initio*, and do not come within the protection of the statute: Lord Ellenborough, C. J.—"The case of *Money v. Leach* decides, that the defendant, in order to avail himself of the objection upon the statute, must shew that he acted in obedience to the warrant. In that case the officers apprehended a different person from that described in the warrant, and therefore not in obedience to the warrant; and Mr. Yorke, the then Attorney-General, who was to have argued on behalf of the officers, gave up the point upon the second argument, as being too great a difficulty for him to encounter. That was

a case of much public interest, and was decided upon great deliberation, and the matter was upon the record;" *Bell v. Oakley*, 2 M. & S. 259. If a constable under a warrant to take the goods of A., take the goods of B., believing them to belong to A., he is protected by the 8th section of the statute, which requires the action to be brought within six calendar months: that was distinguished from the foregoing cases, on the ground that the objects of the 6th and 8th sections are different; *Parton v. Williams*, 3 B. & A. 380. But if officers act in obedience to the warrant of a magistrate, whether it be legal or not, they come within the 6th section of the statute: if it be to seize "stolen sugar," and they seize sugar which turns out afterwards not to have been stolen, and other articles not mentioned in the warrant, though they have verbal directions from the magistrate to seize the latter, the warrant protects them as to the sugar, but not as to the other articles; *Price v. Messenger*, 2 Bos. & P. 158, 3 Esp. 96. Yet where constables, under a warrant to seize black cloth, took cloth of other colours, they were held to be protected by section 8 of the statute; *Smith v. Wiltshire*, 2 Brod. & B. 619; (see *Parton v. Williams*, *supra*); see also *Theobald v. Crickmore*, 1 B. & A. 227. A churchwarden taking a distress under a warrant is within the statute; *Harper v. Carr*, 7 T. R. 270; see also *Milward v. Caffin*, post, 1330.

RICORD v. BETTENHAM.

S. C. 3 Burr. 1734.

ACTION on the case against the master of the ship Syren, on a ransom bill, given by the defendant to the plaintiff, who, in the late French war, was captain of the Badine privateer, to ransom the said ship, then taken by the said privateer. On *non assumpsit* pleaded, and the trial of the issue at Guildhall, the following special facts were stated for the opinion of the Court, subject to which, the jury found a verdict for the plaintiff, 236*l*. "That the Syren was taken by the Badine four leagues off Cape Negrillo, 24th August, 1762: That the plaintiff was a natural born subject of the French King, and was commis*sioned by him, and that the defendant was a natural born subject of Great Britain, and the Syren the property of his owners being British subjects. That at the capture, Joseph Bell, the defendant's mate, was given as a hostage; and the plaintiff, the defendant, and the said Bell, gave and signed the ransom bill, 24th of August, 1762: which ransom bill purported, 'That the ship (then going to take in her cargo at Lucca Martha Brea), and her captain, were ransomed for 300 pistoles, and had a month's time to repair to her destined port; and the defendant obliged himself and owners to pay the said sum within two months after date; and gave his said mate for hostage, whom he agreed to maintain till the day of payment.' That the value of 300 pistoles was 236*l*., and that the Syren was of greater value. That Joseph Bell, the hostage, died in prison, at Port au Prince, 12th October, 1762. That the Syren, after said ransom, arrived at her destined port of Lucca Martha Brea. That at the time of the capture, and till 3d November, 1762, there was actual war between Great Britain and France."

Ransom bills payable to an alien enemy, though the hostage given with them died in prison.
[All such bills now void by 22 G. 3, c. 25.]

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Chambers, for the plaintiff, argued, that unless some special reason be assigned to the contrary, the Court will compel the execution of this contract. Both parties are able to contract. No doubt, but the property of the ship was then in the captor. No doubt, but the captain might bind his owners. Besides, this action is brought personally against himself. The duress of imprisonment will not avoid the act. Imprisonment is lawful in time of war. It saves the life of the vanquished. And all compacts are more sacred in time of war than even in time of peace. *Jura belli conservanda*, is the maxim of Lord Coke. There is no pretence of force or ill usage, after the capture. What then are the special reasons which may except this case out of the general rule. They can only be—1. A supposed want of jurisdiction in this Court to try the cause; 2. The alienage of the plaintiff; or, 3. The death of the hostage.—*1. Want of jurisdiction, if true, ought to have been pleaded in abatement. Every thing is presumed to be within the jurisdiction of the King's superior Courts, till the contrary appears. An imparlance, though special, affirms the jurisdiction; Year-Book

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22 Hen. 6; Bro. Jurisd. 88; Privilege, 15; Continuance, 70; except in the case of some very special imparlances; Hardr. 365; Lutw. 46 (i). In all transitory actions, the Courts at Westminster shall have jurisdiction by supposing the place "where," to be within their reach: 4 Inst. 134; Carth. 11, 354; 4 Inst. 213. This contract is laid in the declaration to be made in the parish of St. Mary le Bone, &c. (k).—2. As to the alienage. That not of course an objection: an alien friend may have a personal action: an alien enemy may sue as executor; may have a safe conduct, &c. Salk. 46; Mor. 431. Allowing that all civil and commercial contracts in time of war are bad, yet the present contract arises from no unconstitutional amity, but can only take place between declared enemies. He that may redeem his life by money, may redeem it by a contract. And though the war is now over, yet an alien, by becoming a friend, does not lose what he was entitled to as an enemy.—3. The hostage was only a collateral security. The body of the hostage is of no use. His relation to the vanquished is the ground of the confidence reposed. He is not a physical equivalent, but a moral security for the ransom. The debt is not annihilated by the loss of the security; Yelv. 179; 2 Stra. 919; Salk. 522; Ff. 20, 5, 9.

Dunning, for the defendant.—This is an action of the first impression in this or any other country. It was once attempted in France, and that attempt repelled. As it never has been brought before, and yet the case must often happen, there is strong presumption that it will not hold. The expedience or reason of the thing would be proper arguments to the Legislature, not to this Court: because the Legislature would not interpose, without *securing a reciprocity to our own subjects; which the Court cannot do. I waive the point of *jurisdiction* (which the owners, on the opinion of some civilians, had greatly relied upon), and of *duress*. There was no duress, but what must necessarily be in such cases. But I insist, 1st—That no action can be maintained on such a contract, if the hostage be laid out of the case. Subjects of different states are incapable of contracting in time of war, or of suing for breach of such contracts. I do not mean the mere alienage. That is no objection in a personal action; at least, must be pleaded in abatement. But this is a radical defect in the parties, on account of their condition as enemies. It might have been pleaded in bar; but not necessary to be so pleaded, because it appears on the face of the declaration (l). They are incapable of contracting or suing at the making and at the breach of the contract. And if the cause of action does not arise at the period of the breach, it is impossible to say when it arises. A personal action once suspended is gone for ever. Alien enemy is plead-

(i) As to imparlances, see *Brewster v. Capper*, ante, 51; *Grant v. Lord Sondes*, post, 1094.

(k) See Lord *Mansfield's* judgment in *Mostyn v. Fabrigas*, 1 Cowp. 170; and

Robinson v. Bland, ante, 258.

(l) See *Bristow v. Towers*, 6 T. R. 35; Com. Dig. *Alien* (C 5, 6, 7); Bac. Abr. *Id.* (D); Vin. Abr. *Id.* (G).

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able in bar (m), and concludes to the action, not merely to the writ; Co. Litt. 129 b. 'Tis true he adds, *donec terra fuerit communis*: but the first opinion is supported by authority, the latter not: 19 Edw. 4, 6, pl. 4 & 6; Bro. *Denisen* and *Alien*, 20; Comb. 394; Carter, 191; Cro. Eliz. 142. We do not dispute, but that a ransom is both lawful and prudent. The question is, how it is to be secured? Certainly not by contract, because the parties are incapable of contracting. This accounts for the practice of taking hostages. The hostage is the only security. Therefore sons, brothers, &c. are usually taken.—2. If the hostage be the only security, then it is released by his death. The paper writing only specifies, upon what terms the hostage is taken and may be detained. The hostage subscribes the paper; but certainly enters into no contract to pay the money. He had an interest in declaring the purpose of the instrument. In this case duress may have some weight, so as not to lay too great a stress upon the * form of the contract. The instrument does not imply a binding contract upon each other: If so, the delivery of an hostage is unnecessary. No body ever yet dreamt of resorting to any other security. I have looked into Grotius and Puffendorff: they sometimes say, that the hostage is the substantive, sometimes the collateral security: they do not accurately distinguish. Molloy. l. 1, c. 8, s. 7, is express, that if hostages are given, he that gives them is free from his faith, &c. No authority to contradict this on the other side. And should a remedy be given to foreigners here, it would be on very unequal terms; since other nations will not allow it to us.

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Chambers in reply.—*Les coutums de la mer*—ransom bills drawn by the captain shall be accepted by the owner. So the ordinances of Louis XIV. Zouch, de jure and judicio feciali, p. 2, c. 54; Grotius, l. 3.

In the declaration the *capture* only is declared to be in time of war, not the *contract*. The fiction of locality will also protect it. After peace, the enemy may sue. An outlaw cannot sue till after reversal, but then he may. So of Popish recusants when reconciled. Case in Chancery; bill for account by an alien enemy: The defendant pleaded alienage: Lord Chancellor over-ruled the plea. (Q^y. by ASTON, J.—Whether he was not resident?—by MANSFIELD, C. J.—That was to get rid of an unfavourable plea, which a Court of equity always leans against. If just, he might have the advantage after answer). Suppose the plaintiff had married an English wife in time of war, could he not now have recovered her fortune? Barbeyrac, in his commentary, has cleared Grotius from the imputation of inconsistency.

* *Dunning*, in answer to the citation from the *Coutums de la* [*568]

(m) *Brandon v. Nesbitt*, 6 T. R. 23; *Caseres v. Bell*, 8 T. R. 166. In the former case, Lord Kenyon observed, that though it was held in *Ricord v. Bettenham*, that the action by an enemy on a ransom bill might

be maintained, the action was not brought until peace was restored, which got rid of the objection: but as to this point see *Furtado v. Rogers*, 3 Bos. & P. 197; *Willson v. Patterson*, 7 Taunt. 439, 1 B. Mo. 133.

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mer, allowed, that the owner ought to redeem the hostage. That question is merely between the owner, the master, and the hostage; between whom, and whom only, we allow a contract to subsist.

Lord MANSFIELD, C. J.—There is no doubt, but the master has a power to contract, so as to bind his owners (a). These ransom bills seem equally for the benefit of the captors, who are thereby enabled to pursue and take other ships, and of the vanquished, who are thereby released at half value. But if it be true, that no action of this sort is allowed in other countries, it deserves to be well considered before we establish the precedent. Otherwise upon principles I have no doubt.

Blackstone, who was retained for a second argument for the defendant (against *Norton*, Attorney-General, for the plaintiff,) thereupon offered to make enquiry in the next vacation into the practice of France and Holland. Lord MANSFIELD.—Let it therefore stand over upon the single point of that enquiry. Afterwards, in Michaelmas Term, *Blackstone* acquainted the Court, that he had stated the case to M. Meerman, Pensionary of Rotterdam, and M. de Beaumont, Avocat du Parlement de Paris: That the former had informed him, that the case had never happened in their courts; but that he and all the lawyers of that country, whom he had consulted, were of opinion, that such an action would be sustained in their courts; That M. de Beaumont (to whom the case was stated as between an Englishman and a Spaniard) was entirely of the same opinion; and added, that the very case had a few years before been decided in the Parliament of Normandy in favour of the captors, under which the parties acquiesced.

[*569] * Lord MANSFIELD, C. J.—I imagined the enquiry would turn out as it has done. Ransom bills are to be encouraged, as lessening the horrors of war. Justice ought in time of war to be administered to foreigners in our Courts in the most extensive and liberal manner, because the Crown cannot here interpose, as it can in absolute monarchies, to compel the subject to do justice, in an extrajudicial manner.

Postea to the plaintiff (c).

(a) This observation is not applicable, for here the action was against the master. A promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo (*Buller, J., dissent.*); *Yates v. Hall*, 1 T. R. 73, where the subject of ransom bills is discussed. So the owners are liable for necessary supplies furnished or repairs done by the master's order; *Webster v. Seekamp*, 4 B. & A. 352.

(c) There were similar decisions in the cases of *Cornu v. Blackburne*, 2 Doug. 640, and *Anthony v. Fisher*, 1d. 649, n.: but in the latter case, the judgment was reversed

on error in the Exchequer Chamber, where the Court unanimously determined, that an alien enemy could not, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war; *Ibid.* And *Ld. Abingley*, in *Furtado v. Rogers*, 3 Bos. & P. 200, observed, that no action was ever maintained upon a ransom bill in a court of common law until the case of *Ricord v. Bettenham*, and that he had the authority of Sir W. Scott for saying, that in the Admiralty Court the suit was always instituted by the hostage. But now all questions on the law of ransoms are put an end to by 22 G. 3, c. 25, which enacts (s. 1) that it shall not be lawful for his Majesty's subjects to ransom or to enter into any agree-

ment for ransoming any vessel or goods captured by the enemy: and (s. 2) that all contracts and agreements, which shall be entered into, and all bills, notes, and other securities, which shall be given by any person or persons for ransom of any such ship or vessel, or of any merchandise or goods on board the same, contrary to that act,

shall be void in law, and of no effect whatsoever: which act is perpetual. Similar enactments are contained in 33 G. 3, c. 66, s. 37, and 43 G. 3, c. 160, s. 33, but they expired with the late war. See *Parsons v. Scott*, 2 Taunt. 363; *Webb v. Brooks*, 3 Taunt. 6.

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MICH. TERM,—6 GEO. III. 1765.—K. B.

BULBROKE v. GOODERE.

S. C. 3 Burr. 1768.

ACTION of trespass for cutting his nets and taking his fish. Defendant justifies as water-bailiff of the Thames, under the King's letters patent, and that the plaintiff was fishing with unlawful nets, contrary to the statute 1 Eliz. c. 17.

Water-bailiff may not cut unlawful nets, or seize fish.

Lord MANSFIELD, C. J.—The offence is committed contrary to a penal act of Parliament. The punishment must follow the method which the act prescribes.

*WILMOT, J.—It was argued for the defendant, that this was a nuisance, and therefore he might abate it. But I think a violation of a public penal statute is not a nuisance, but an offence of a different species.

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Violation of a public law not a nuisance.

YATES, J.—The remedies of distress for damage feasant and abatement of nuisances, are for private injuries. This is made a public crime. The act gives no power to seize fish or to cut nets. A new judicature for this offence is created by the statute. The water-bailiff has no jurisdiction at all.

ASTON, J., of the same opinion.

Judgment for the plaintiff.

LA VIE and Another, Assignees, v. PHILIPS and Another, Assignees.

S. C. 3 Burr. 1776.

TROVER for five fans: Verdict for the plaintiffs, subject to this special case. 13th March, 1764, a commission of bankruptcy issued against John Cox, and assignment was made the same day; and, on 26th April, 1764, another commission issued against Jane Cox his wife, who was a milliner. That, by the custom of London, as stated in the *Liber albus*, "where a feme covert useth any craft in the city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a feme sole concerning every thing that toucheth her said craft; and if the husband and wife shall be impleaded in such a case, the wife shall plead as a feme sole in a Court of record, and shall have her law and other advan-

A wife, being a sole trader in London, is liable to a commission of bankruptcy, and her assignees shall come in, paramount the assignees of the husband; though his was the prior bankruptcy.

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"takes by way of plea, as a feme sole; and if she is condemned, "she shall be committed to prison until she has made satisfaction, and the husband and his goods shall not be charged or "impeached." That, in this case, Jane Cox the wife was a sole trader, and carried on a separate trade in the city of London: That the fans in question were part of the effects of her sole trade; and that the assignees of the husband's commission seized them the day the commission issued, and the assignment made.

- [*571] **Eyre*, Recorder of London, for the plaintiff, argued,—
1. That the assignees of the husband had no right to take these goods, in prejudice of the creditors of the wife.
 2. That a commission of bankruptcy may, under the custom, issue against a feme covert.
1. At common law the state of coverture carried with it many disabilities, and many consequential privileges. It is a general rule, that a wife can't contract (a); but in case of necessities she may: she may convey by fine (b); and the Queen consort may sue and be sued, take and dispose, &c. The same kind of politic capacity in this custom for London wives, if they carry on the trade on their sole account; *Langham* and *Bowen*, Hetl. 9, Littlet. 31, Cro. Car. 68. A wife may plead as a feme sole. Strange, if the interest to the husband could be affected where he is not called upon to defend it: therefore clear, that he has no interest. The wife is alone responsible: because it is her interest only, and not the interest of the husband. Not much light to be thrown upon this case from authorities. But there is, M. 29 H. 6, *Eppings* and *Harding*, cited Cro. Car. 68, in marg. The inference from this case is, that as the parties went to issue, "whether the wife was a feme sole merchant or no," it proves, that, if the fact was so, it was allowed to be a good custom. So, 21 Hen. 7, it appears from the argument of *Palmes*, that it was the idea of the times, that a wife may be a sole merchant. I allow, that if the husband will intermeddle, the wife would not be a sole trader in any future dealings; but insist, that his intermeddling without her consent shall not deprive her of her substance before acquired. *Juxon* and *Juxon*, 1 Atk. 278; a husband is not permitted in equity to deprive the wife of her sole earnings or savings. (*Sed per Cur.*—Atkins must not be cited as authority). No intermeddling of the husband can deprive the wife's creditors of their remedy against the wife, nor unite the wife's property to the husband's. If the husband has any interest, it is only a remote possibility in the surplus after payment of the wife's debts.
- [*572] *The seizing of the goods in the present case can be justified on no other principle, but denying the custom; or by maintaining, that the husband has a property in the goods of the wife. 2. The only question left is as to the right of the plaintiffs under the wife's commission of

(a) See *Hatchet v. Baddeley*, post, 1079; *Lean v. Schutz*, post, 1195.

(b) *Ann Moreau's Ca.*, post, 1205.

bankruptcy: and as to that, if the wife has a separate property, it follows that it must be liable to the remedy of her separate creditors.

Dunning, for defendants.—I dispute not the validity of the custom. The question is only on the import and extent of it, which is equally new and important. Husbands in London have every marital right, unless restrained by the custom. One general marital right is, that the goods of the wife are the property of the husband. This custom does not abridge it; but only gives him a peculiar privilege to be exempt from the contracts of the wife. The property remains in the husband as fully as at common law, except that it is liable to the sole debts of the wife. It is convenient to trade, that the wife should sue and be sued; but no reason, that (subject to this control) the husband should not have the ultimate property. It is difficult to shew, why, if the husband has any interest in the subject, it should not be liable to his debts. Customs are *stricti juris*: if they have clearly obtained, the law allows them; but it will not allow any consequential effects, however reasonable, if not within the terms of the custom: 1 Roll. Abr. 567; 2 Leon. 109. This is a right of suing or being sued as a feme sole, that can only be taken notice of in the city courts: Moor, 135; 1 Leon. 131; 1 Mod. 26; Cro. Car. 69; *Soan and Mace*, Comb. (c). A husband may release costs obtained by the wife in the Spiritual Court. If the husband has any interest, every *scintilla* of it passes to the assignees of the husband. If the commission against the wife could be at all supported, it came too *late. [*573] It does not follow, that the creditors of the wife have no remedy; for they may prove their debts under the husband's commission, or perhaps (in equity) may have a separate remedy against the separate effects. But a commission of bankruptcy will not lie against the wife. This is the second instance that ever happened: the first was never litigated; it was in 1741, and a certificate was obtained under it. I admit that the general words of the statute of Elizabeth, and Jac. 1, are large enough to take in the wife: but the provisions of the acts plainly suppose the object of them to be *sui juris*. Bankruptcy was originally considered as an offence. Under the coercion of the husband the wife may be at any time made to commit an act of bankruptcy, and be guilty of this offence (d). Not surrendering in time is still more penal: the husband's co-

(c) P. 42. So it has been decided, in a more recent case, that she cannot sue, as a sole trader in London, without her husband, in the superior Courts at Westminster; *Candell v. Shaw*, 4 T. R. 361. Neither is she liable to be sued as such in those Courts; and even in the city courts the husband should be joined for conformity: for she cannot make an attorney to conduct her defence, either in the city courts, or in Westminster Hall; yet execution shall be against her alone; *Beard v. Webb*, 2 Bos. & P. 93: that case was decided on

a writ of error in the Exchequer Chamber, and Lord Eldon, C. J., there gave a very elaborate judgment, in which all the authorities on this head are examined. See also *Pope v. Faux*, post, 1060; Com. Dig. London, (N 7); Bac. Abr. Customs of London, (D).

(d) For if husband and wife commit an offence, the wife is supposed, in law, to have acted under her husband's coercion, (he having been present at the time), and will be acquitted on the ground of not having been a free agent.

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ercion may make the wife commit a capital crime, if liable to bankruptcy. All the wife's sole estates, jointures, &c. might be destroyed by the coercion of the husband. It is clear, that no execution upon the wife's separate effects could issue, but under the narrow and limited jurisdiction of the city courts. Therefore, a commission of bankruptcy, which stands in the place of an execution, shall not.

Eyre, in reply, insisted, that the idea of bankruptcy is connected with the idea of sole trader, and can affect nothing but personal effects, the object of such sole trade, and the only ground on which credit is given. Or, if otherwise, supposing the custom established, those consequences must be allowed, without which it cannot exist.

Lord MANSFIELD, C. J.—I have no doubt in this case. Mr. *Dunning* in his argument has put the question, whether the husband is totally excluded from all property in the wife's effects. But that is not the present question, nor proper now to be determined. But taking it for granted (*argumenti gratia*) that the husband might stop the trade for the future, and after paying her debts be entitled to the residue of her effects; yet he cannot do it with * a retrospect, for that would destroy the custom totally. Any action that is brought against the wife by her creditors must be in the city courts; but the custom being a good one, use may be made of it in any court in the kingdom. If the husband were sued for the wife's debts in this Court, he might surely plead this custom in bar (e). Perhaps it would be difficult for the wife herself to find a remedy against the husband if he seized her effects; but not at all for the wife's creditors. Those effects are, in the first place, liable to the wife's creditors, and shall not be first applied to the general debts of the husband. In equity, where there are sole and joint estates, and sole and joint bankruptcy, separate commissions are taken out. By the custom she alone is liable to execution, to imprisonment of her person. The bankrupt laws certainly extend to London, so that the words of them will clearly reach her. And therefore a commission of bankruptcy should, for the benefit of herself, be allowed to issue

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(e) "The customs in the city of London are of different kinds; some are available every where, and others, of which this of a *feme-covert* sole merchant suing and being sued with reference to her transactions in London is one, are spoken of in the books in terms which are not very intelligible, unless explained by the cases on the subject. These latter customs are called Executory Customs, the exposition of which expression is, Customs united to the Courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior Courts by way of bar."—"A custom is executory which is united to a Court, and it is executed when it has been acted upon by the Court to which it is

united:" per Lord *Eldon*, C. J., 3 Bos. & P. 98, 100. And again, after quoting the words of Lord *Mansfield's* judgment, as reported in *S. C.* 3 Burr., viz.; "The *feme* sole trader in London, under this custom, must indeed bring her action in London, but such custom would be allowed in any other Court in a defence by the husband;" his Lordship says, "This is a clear exposition of the language used by *Walmesley* in *Stanton's Case*, (Moor, 135), and by *Danby*, in the Year-book, that customs united to the city courts are executory, and pleadable there only; but that such customs, if acted upon in those courts, may be pleaded in the superior Courts as matter of defence;" Id. 103.

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against her; otherwise she may be liable to perpetual imprisonment; and also for the benefit of the creditors, because it gives them an easy way of coming at the specific fund that is to pay them. As to precedents of such commissions, if several had passed *sub silentio*, it would have been immaterial. But in that of 1741, a certificate was allowed by Lord *Hardwicke*, stating the feme covert to be a sole trader: This is therefore a strong authority. As to all the inconveniences supposed to follow from this proceeding, Mr. *Recorder's* reply is a clear answer. Her customary capacity relates only to her effects in trade. And as to the coercion of her husband, if she acts under an invincible necessity, she cannot at least incur a capital punishment.

WILMOT, J.—This proceeding is a necessary consequence of the custom. If the wife's goods can be taken in a common execution, they may be taken in execution under a commission of bankruptcy. The question is between the two sets of creditors, not between the husband and wife. And the custom is for the benefit of commerce by multiplying traders. As to saying if the husband can intermeddle and put an end to the trade, the assignees may do so too; I think the husband cannot intermeddle so as to defeat the creditors of the wife. As to the bankruptcy of the wife, that is a consequence of the right to trade. *The custom does not indeed extend to all [marital] [*575] rights, but only to those that belong to the trade: it extends to those debts, which are contracted in the course of her customary trade.

YATES, J.—It is impossible to read the custom without drawing from it the conclusion contended for by the plaintiffs. Bro. *Custom*, 3; custom of London may be pleaded in bar. While the custom is executory, it can only be alleged in the Mayor's Court; when executed, it may be pleaded in any other Court (f). The husband has a right to seize his wife's property, when he pleases; yet subject to the custom, so as not to defeat her creditors; who may follow the effects into the hands of the husband. And I think the coercion of the husband would excuse her from any crime or felony.

ASTON, J.—The reason on which this custom is founded was well discussed a few years ago in C. B. in a case upon the custom of the manor of Harwell, Berks. It is grounded on the consent of the husband. This consent does not extend to those things which do not concern her craft. Bankruptcy is only a statute execution. The assignees stand in the husband's place. If they are entitled to the surplus, they must come in after the creditors of the wife.

Postea to the plaintiff (g).

(f) See 2 Bos. & P. 103.

(g) Lord *Eldon*, C. J., after quoting the words of *Yates*, J. says—"It appears that the Court there considered the custom as executed in the circumstance of the assignees of the wife having possessed themselves of her property, and that

the custom was therefore examinable in the superior Courts, in a case where it came collaterally before them;" 2 Bos. & P. 103. So upon a petition to supersede a commission of bankruptcy, Lord *Hardwicke* decided, that as the woman against whom it had issued was admitted to be

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the daughter of a freeman of London, and appeared plainly to be a separate trader by the custom of London, she was

clearly liable to bankruptcy, notwithstanding her coverture; *Ex parte Carrington*, 1 Atk. 206. Com. Dig. *Bankrupt*, (A), acc.

ZOUCH, Lessee of ABBOTT and Another v. PARSONS.

S. C. 3 Burr. 1794.

Conveyance of an infant mortgagee is binding, and cannot be avoided by his entry during infancy. [*Quare tamen.*]

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IN ejectment, a special case. John Bicknell, seised in fee, by indentures of lease and release, 24th and 25th March, 1750-51, conveyed the lands in question to William Cook and his heirs, by way of mortgage for 280*l.* William Cook died, leaving John Lamb Cook, an infant, his son and heir, and his widow and said John Lamb Cook his executors and residuary legatees. John Bicknell, the mortgagor, afterwards brought the title-deeds to one Williams, *an attorney, to procure 400*l.* to pay off said mortgage, and for other purposes; who procured it of the lessors of the plaintiff: and, by lease and release, 29th and 30th June, 1761, the said John Lamb Cook then an infant between sixteen and seventeen), and Elizabeth Cook the widow, in consideration of the 280*l.*, and said Bicknell, in consideration of 120*l.*, released and confirmed the premisses to the lessors of the plaintiff and their heirs, to secure said 400*l.* Williams, when he drew the deed, apprehended the whole 280*l.* to remain due to the Cooks; but, in fact, only 109*l.* thereof remained undischarged, the residue having been paid off in the lifetime of William Cook. Bicknell continued in possession from the time of his mortgage to William Cook, and in 1756 mortgaged the same to Thomas Thorne for a term of years, to secure 200*l.*; and Thomas Thorne, in March, 1762, assigned the same to the defendant Parsons, in consideration of 228*l.*, the principal and interest then due. But before the said assignment, Williams, the attorney for the lessors of the plaintiffs, gave notice to the defendant of their mortgage in fee. On 27th March, 1764, two days before the Assizes, John Lamb Cook (being still an infant under twenty years of age), made an entry on the premisses, in order to avoid the said lease and release of 1761 to the lessors of the plaintiffs. *Qu.* Whether the lessors of the plaintiffs have a right to recover the premisses?

Lord MANSFIELD, C. J., delivered the opinion of the Court. The merits will turn on two questions:—1st, Whether this conveyance bound the infant? 2d, If not, whether the defendant can take advantage of it?

1st, Miserable indeed would be the condition of infants in respect of themselves, if they can do no binding acts; and in respect of others, if they were bound by none. The law, at the same time that it protects the imbecility of infants, permits many of their acts to be binding (*h.*). If an infant does a right

(*h.*) An agreement made by an infant, being for his benefit at the time, shall bind him; *Maddon v. White*, 2 T. R. 159. An infant may contract for necessaries; *Hands*

v. Slaney, 8 T. R. 578. Yet he cannot accept a bill of exchange for them; *Williamson v. Watts*, 1 Camp. 552 (see Mr. Campbell's note, *ibid.*): and if he give a

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thing, which he was compellable by law to do, his act is good : as if he makes equal partition, pays rent, admits copyholders, &c. ; Co: Litt. 172 a ; 9 Rep. 85 b ; *Conney's Case*, 2d *Resolution. Held, by *Fortescue*, C. J., 18 Hen. 6, that an attornment of an infant is good, though he is not compellable to attorn : Co. Litt. 315 a, S. P. The reason is manifest ; because a right and lawful act is not within the reason of the privilege. In *Holt* and *Ward*, Stra. 937 (i), if an infant of fifteen could have been compellable in the Spiritual Court to perform a promise of marriage, it would have made it a binding contract ; and therefore civilians were heard to that point. Another rule is, that acts which do not affect an infant in point of interest, but are only the execution of an authority entrusted to him, are binding : such as presentation to a church, &c. (k). A third rule is, that the privilege of infants is a shield, and not a sword. It shall protect them from fraud and oppression, but shall not be turned into an offensive weapon to assist fraud and oppression : 2 Leon. 108 ; Cro. Eliz. 124 (l). In the present case, the fee descended as a pledge for the money borrowed : the infant had no beneficial interest : he was bound, in justice, to reconvey upon payment : that payment has been made to the proper person. An adult would have always been compellable to convey, and so are infants by the statute 7 Anne (m). The money was paid by the plaintiffs, who have also, on the faith of this conveyance, advanced a further sum. The infant's conveyance is merely matter of form. Supposing it avoided, he would now be compelled to make it over again. It is clear that he is expressly a trustee : the legal estate is in him as a mere stranger. The plaintiffs have, in point of time, the prior equity ; and even had the defendant been prior, yet

bill when of age for articles supplied to him when an infant, equity will, under circumstances, relieve against it ; *Brook v. Galley*, 2 Atk. 34. An action does not lie on an account stated by an infant ; *Trueman v. Hurst*, 1 T. R. 40. He cannot bind himself in a bond to pay principal and interest ; *Fisher v. Mowbray*, 8 East, 330. He may bind himself apprentice ; *Newbury v. St. Mary's*, 2 Bott, 363 ; *R. v. Saltern*, 1 Bott, 613 ; *R. v. St. Petrox*, 4 T. R. 196 ; *R. v. Cromford*, 8 East, 25 ; *Davis's Case*, 5 T. R. 715 ; *R. v. Arncliffe*, 3 B. & A. 584.—Com. Dig. *Infant* ; Bac. Abr. *Infancy*, (T) 1 ; *Bainbridge v. Pickering*, post, 1325.

(i) Truly reported in Fitzg. 175, 275 ;—see 3 Atk. 610.

(K) Co. Lit. 89 a ; 3 Inst. 156 : and it is reported in 1 Burn's Ecc. Law, 138 (ed. 1809), *Arthington v. Coverley*, that Lord King, C., said, that if the infant were but a year old or younger, they ought to put a pea in his hand, and guide it to sign the presentation ; S. C. 2 Ab. Eq. 518 ; Vin. Abr. *Collation*, pl. 10 : but see *Shapland v. Byoler*, Cro. Jac. 98.

(l) And 115, *Piggott v. Russel* ; the

case of a fine levied by an infant. As to settlements made on the marriage of a female infant, see *Harvey v. Ashley*, 3 Atk. 607 ; *Drury v. Earl of Buckingham*, 3 Bro. P. C. 492 (Tomlin's ed.), 2 Eden, 60 ; *Carruthers v. Carruthers*, 4 Bro. C. C. by Eden, 500, and cases there referred to.

(m) C. 19 : by which infants having estates in lands, &c. only by way of mortgage, are enabled by the direction of the Court of Chancery or Exchequer to convey and assure any such lands in such manner as the said Courts shall direct : and such infant mortgagees shall be compelled by such order to make such conveyances as aforesaid, in like manner as mortgagees of full age are compellable to convey or assign their mortgages. As to the construction of this statute, see *Ex parte Prosser*, 2 Bro. C. C. 325, and Mr. Eden's note, *ibid.* ; *Ex parte Anderson*, 5 Ves. J. 240 ; *Eoslyn v. Forster*, 8 Ves. J. 96 ; *Ex parte Vernon*, 2 P. Wms. 549 ; — *v. Hancock*, 17 Ves. J. 383 ; *Ex parte Carter*, 2 Dick. 609 ; *Ex parte Sergison*, 4 Ves. J. 147 ; *Ex parte Mair*, 3 Atk. 479 ; and 1 Fonbl. Equity, 83 (5th ed.).

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his parting with the title-deeds would have postponed him to the plaintiffs.

Therefore we are all clear upon the first point—that this conveyance bound the infant.

2d, But supposing it did not, then whether the defendant could take advantage of its imperfection depends upon two points. 1st, Whether an infant's conveyance, by lease and release, be in general void, or only voidable? 2dly, If voidable only, whether this entry of the infant avoided it?

[*578] 1st, Perkins, s. 12, says, all deeds of an infant which take effect by manual delivery are only voidable. Bro. *Dum fuit* **infra etatem*. 1st, Grant of a rent by infant only voidable. There is no difference between a feoffment and any other deed, which conveys an interest: both are equally solemn. Littleton, s. 259, makes no distinction in case of infants. 2 Inst. 673; bargain and sale inrolled by an infant is denied to be matter of record, but the infant may avoid it. The case of a feme covert is different, for her writing, sealed and delivered, has only the form of a deed, and she may plead *non est factum* (a). Perkins, s. 154, is clear that the deeds of a feme covert are void; of infants, only voidable. Two objections to this were made at the bar. 1st, That leases by an infant, on which no rent is reserved, are merely void.—2dly, That a surrender by an infant is absolutely void. As to the first point, there are many obiter sayings to that effect, but no case that has been adjudged upon this single ground. *Hunfreston's Case*, Moor, 103, 2 Leon. 216, comes the nearest to it: it is there said to be void, by *Wray* and *Southcote*. This was in the case of a parcel lease, made for the infant's benefit, to try his title. But reason at last prevailed against artificial refinement. There may be many beneficial reservations, without a rent; and rent may be reserved, and yet the lease be prejudicial to the infant. What seems decisive is, that the lessee cannot avoid such a lease, and therefore it is not *ab initio* void (o). As to the other point: *Lloyd and Gregory*, Cro. Car. 502, W. Jones, 405, cited to prove it. Croke states the doctrine of the surrender being void, because of infancy. Jones says, that the surrender of the first lease being only to take a second, which was void by statute 13 Eliz. the surrender was therefore void: Jones is certainly right (p). But it appears, in 1 Roll. Abr. 728, that a saying to the same import was dropped at the trial at bar, which probably confused

(a) "Where it is held that the deeds of infants are not void, but voidable, the meaning is, that *non est factum* cannot be pleaded, because they have the form, though not the operation of deeds, and therefore are not void upon that account, without shewing some special matter to make them of no efficacy. Therefore, if an infant make a letter of attorney, though it be void in itself, yet it shall not be

avoided by pleading *non est factum*, but by shewing his infancy;" per Cur. in *Thompson v. Leach*, 3 Mod. 310.—See *Whelpdale's Case*, 5 Rep. 119 a; Com. Dig. *Plander*, (2 W 22).

(o) But see *Davies v. Marington*, 2 Sid. 109: also *Smith v. Low*, 1 Atk. 489, and *Bac. Abr. Leases*, (B).

(p) See *Bac. Abr. Infancy*, (1) 3, pa. 600; also *Wilson v. Sewell*, post, 624.

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Croke†. *Thompson and Leach*, 3 Mod. 310 (q) has been cited to shew, that nothing but the feoffment of an infant is voidable; all other deeds are void. But in *Palm. 254*, this doctrine is *otherwise held. The comparison between an infant and *non-compos* is not just; but, supposing it so, there is no instance, in which the surrender of a *non compos* has been held to be absolutely void (r). If indeed a new case should arise, wherein it might be more beneficial to an infant to make his deed voidable than void, this would be ground enough to make it an exception to the rule (s). But be the point as to the solemnity of the deed as it may, it is not necessary upon the present case: for we are all of opinion, that the matter of the present deed is such, that at most it can only be voidable. 2dly. Whether the entry of the infant avoided it? In feoffments made by an infant it is clear, that though during his minority he might enter to maintain his possessory right; yet the feoffment itself remained good, till avoided by him at full age. An infant cannot bring a *dum est infra ætatem* during his minority (t); because his election, when he comes to full age, shall not be taken away. And the defendant shall not in the present case make the election for the infant. Therefore we are clear, that the lessor of the plaintiffs must recover; and well for the defendant it is, that we are of that opinion, for otherwise in equity he must have been finally defeated, and paid all the costs. It is happy when, consistently with the rules of law, complete justice can be done in the first instance.

Postea to the plaintiff (v).

† "Rolle agrees with Croke that this was the point upon which the Court afterwards determined the special verdict."—*Note by the Reporter.*

(q) *S. C.* 1 Lord Raym. 313, 1 Com. R. 45, 1 Show. 296, Show. P. C. 150;—but see *Bac. Abr. ubi supra*.

(r) By 20 G. 2, s. 31, infants, lunatics, and feme coverts interested in any lease, may by themselves, their guardians, or committees, surrender the same under the direction of the Courts of Chancery or Exchequer.

(s) *Keane v. Boycott*, 2 H. Bla. 511; *Baylis v. Dymaley*, 3 M. & S. 477.

(t) *Fitz. N. B.* 445, & 466 D (4to ed.) he may avoid his feoffment by entry during his minority; but shall not have his writ till full age.

(v) See the observations of *Ld. Eldon, C.*, on this case in — *v. Hancock*, 17 Ves. J. 383; and he there says "that, though it is true, that, where an infant conveys as a trustee within the statute, not being so, he will not be bound by his conveyance under such an order; yet if it is a case, in which he would be bound to convey when of age, his conveyance being voidable only during his infancy, and until avoided passing the legal estate, and no one having a right to elect for him whether it should be void or not, he would when he became adult be placed in such a situation, that if

he sought at law to avoid his deed a Court of Equity would prevent him." It is also recognized by Mr. Hargrave, *Harg. Co. Lit.* 51 b [note 331]. Yet Mr. Preston questions the propriety of the decision, and uses the following words: "It may be useful to observe, that prior to the Case of *Zouch v. Parsons*, a lease and release by an infant has been treated by the profession and the best text writers as absolutely void. *Ld. Mansfield* and the Court of K. B. decided, that a conveyance by an infant by lease and release was under the circumstances, which occurred in that case, voidable only and not void. But no lawyer of eminence has thought it safe to follow that decision in practice: and that excellent property lawyer, *Lord Eldon*, has repeatedly approved the observations of counsel, when questioning the authority of this case.— Though it has not been expressly overruled, the probability is, that whenever the point shall require an express and explicit decision, it will be determined, that a conveyance by lease and release made by an infant cannot, under any circumstances of interest or no interest in the infant, or benefit or no benefit to him, be supported;" 2 *Prest. Convey.* 240, 250. These are al-

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similar observations, Id. 375; and in that eminent gentleman's Treatise on Abstracts, vol. 1, 324, he says, that "no experienced conveyancer will accept a title under the authority of this decision." To judge of

the weight of these remarks, the reader must consult an ingenious note by Mr. Coventry in his edition of Powell on Mortgages, vol. 1, 208 (5th ed.), and 1 Fombl. Eq. 80 (5th ed.).

THE KING v. MARSDEN and Others.

S. C. 8 Burr. 1812.

Information in nature of *Quo Warranto* will not lie for encouraging the exercise of a franchise.

Qn. Whether it will lie for holding a fair or market?

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NORTON and others moved for an information in the nature of *quo warranto*, to shew by what authority the defendant held or encouraged a market for cattle, on every other Wednesday, at Wakefield in Yorkshire.

Wedderburn and others shewed for cause, that this was no market, but only a voluntary place of sale, much for the convenience of the country, and had no privileges as franchised markets have. And that, since the statutes 3 & 4 W. & M. (u) and 9 Anne (w), the Court cannot grant an information in the nature of *quo warranto* for exercising such a franchise, but only against individuals claiming franchises in corporations. If any such power lodged any where, it is in the Attorney-General. And they cited Lord Raym. 1409; Stra. 1161, 1213; 3 Mod. 127; Salk. 374; 2 Show. 201; Tremaine, 409; 2 Inst. 282; Cro. Jac. 259; 2 Hawk. 262, c. 26, sect. 7, & 9, and 1 Sid. 86(x).

Lord MANSFIELD, C. J.—If it were necessary to form an opinion, whether this Court can grant [an] information in nature of *quo warranto* for holding a fair or market, I should desire time to consider of it. The only question would be, whether before the statute W. 3, the Coroner used to file such informations. If he did, the act does not take away the power; if he did not, the act does not give it. No instance has been produced of any informations in nature of *quo warranto* before the stat. of Qu. Anne, unless filed by the Attorney-General.

But this is not necessary to be now determined; because this rule cannot be now supported under the circumstances of the case. The charge is, for *holding, or promoting and encouraging the holding*. No information in nature of *quo warranto* can be for *promoting and encouraging*. But the rule could not otherwise have been adapted to the case. For,

2dly. No person is charged with claiming a right to hold. The Duke of Leeds is the lord of the manor: the soil belongs to the trustees of the charity school. Neither of these are before the Court. If it be any offence, it is an unlawful assembly; no usurpation of any franchise.

WILMOT, J.—In the civil law *jus nundinarum oritur a principe; quia, ubi est multitudo, debet esse rector*. This the ground of prerogative in granting fairs and markets. The writ of *quo warranto* was the usual way of trying this franchise, an-

(u) C. 18.

(w) C. 20.

(x) See also *R. v. Williams, ante*, 93, and

cases there referred to; *R. v. Bedford-Lane*, 6 East, 356.

ciently: but when eyes were dropped, this writ was disused. If it were not for the *King and Hertford* (y), 12 W. 3, I should not doubt, but that this Court has no power to grant such information as desired; but that case staggers my judgment. An action may be brought by the private owner of any market that is injured (z), notwithstanding the Crown may have issued a writ of *ad quod damnum*, and upon the return granted the franchise.

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YATES, J., strongly inclined against the power of the Court, but gave no determinate opinion.

ASTON, J.—I have a note, that in 14 Geo. 2 (a), *Lee, C. J.*, said; that informations in nature of *quo warranto* are never granted for markets or fairs, unless where tolls are claimed.

Rule discharged *per tot. Cur.*

(y) Salk. 374.

(z) *Yard v. Ford*, 2 Wms. Saund. 172, and notes.

(a) *R. v. Owen*, 3 Burr. 1820, in marg.;

Ibbotson's Case, Ca. temp. Hardw. 261, Bac. Abr. *Informations*, (B); Com. Dig. *Quo Warranto*, (B).

HILARY TERM,—6 GEO. III. 1766.—EXCH.

The Case of the LONDON WHARFS.

IN 1762 the King, upon the application of the principal merchants of London, in number about 800, issued a commission to certain persons therein named to assign and set out fit and convenient places, for extending the present legal wharfs in the port of London; upon a suggestion, that the present wharfs were not sufficient for the purposes of trade and navigation. 24 January, 1763, they returned a large extent of ground, including the Tower ditch, or so much of it as his Majesty should not think fit to reserve for the public service. 11 February, 1763, this return was quashed by consent, in this Court, for uncertainty; but the Court were clearly of opinion, that the expedience of an extension was wholly in the breast of the Crown. After many hearings before the Lords of the Treasury, and disputes with the commissioners of the customs, 7 March, 1765, another commission issued, which empowered the commissioners to assign a certain spot in the parish of St. Katherine's, between Irongate Stairs and the King's Brewhouse, for this purpose; such extension being necessary and expedient. The commissioners, 19 April, 1765, return and assign a part of the said spot, setting forth its situation and dimensions, to be from thenceforth legal wharfs, on condition they be cleared in such a time, and make many regulations for the benefit of trade thereon. In Easter Term, 1765, application was made to the Court to stop the filing of the said return, till all parties could be heard upon it; and accordingly the case was argued on two several days in Trinity Term, by *Comyns, Hussey*, Sir

Wharfs must be assigned in open places only.

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Anthony Abdy, Eyre, Recorder of London, Cox, Madox, Cooper, Harrison, and Dunning, for the City of London, the proprietors of the old legal wharfs, the proprietors of sufferance wharfs, and the inhabitants of St. Katherine's, who all desired the commission and return to be quashed; and by *Blackstone* and *Wallace* for the merchants and commissioners, who prayed the same to be filed and allowed: The Attorney and Solicitor-General likewise attending to maintain the rights of the Crown, if they should be impeached; but they declared themselves satisfied with the defence made by the merchants' counsel. And as the argument was very diffuse, it may suffice to abridge that defence, which states the several objections made by the nine counsel, who opposed the commission, though for different parties, and upon different grounds of interest.

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They considered, 1st. The power of appointing wharfs and keys at the common law, and how it was altered by act of Parliament. *2d, The objection to the legality of the present commission. 3d, The objections to the return. 1st, By the law of nature and the civil law, the shores of the sea and navigable rivers were free and open to every body. But in all nations, which have built their policy on the feudal law, such shores, and the tolls arising from landing thereon, have always belonged to the Sovereign, as a branch of his royal prerogative. Crag. 1, c. 15, sect. 15. Feud. l. 2, t. 56. In England, the King is bound of right to defend his kingdom against the sea, as well as against enemies; F. N. B. 113. And therefore, before the statute 6 Hen. 6, he was empowered to grant a commission of sewers at the common law; 10 Rep. 141. And if lord of all the shore, *a fortiori* of ports and havens, which are the inlets into the kingdom, and the gates of the realm; Dav. 9, & 56. The King only can appoint lawful ports (*a*), for ingress into, and egress from, the kingdom; and therefore, in the 15th of King John, ships were seized for putting in at a place which was no legal port. Mad. Hist. Exch. 530. Besides reasons of polity, reasons also of revenue conspired, to establish this doctrine, in order to preserve the inherent fiscal rights of the Sovereign: Not the hereditary customs; for, though held to be due by prescription, Dyer, 165, and by Lord Hale, Hardr. 214, yet Lord Coke, 2 Inst. 59, and Vaughan, 161, have clearly shewn, that even the demi mark on wools, &c. was granted by act of Parliament, 3 Edw. 1, and the same is acknowledged in stat. 25 Edw. 1. But those of a more early date, as the prisage and butlerage of wines, which are mentioned in Mag. Rot. Rich. 1; Mad. Hist. Exch. 526, 532; whether these arose from mere prerogative, or were granted in some great council, cannot be now ascertained (*b*). But, in either case, the right of limiting ports and havens was necessarily consequential to, perhaps coeval with, these duties. The

(a) See Ld. C. J. Hale, DE PORTIBUS MARIS, c. III, in 1 Hargrave's Law Tracts, 50 et seq.; Bac. Abr. Prerogative, (B), s. 5, vol. v, 502, vol. vii, 509; 1 Bla.

Comm. 263.

(b) See the authorities collected in Vin. Abr. Prerogative, (E. 2, G. 2); Com. Dig. Id. (D 44, &c.); 1 Bla. Comm. 313.

King's customers resided in those ports, and no landing-places were allowed, but such as the King assigned by charter, or were so by prescription, which presupposes a charter. No persons can, at this day, make a *new port without the King's grant, or an act of Parliament. A Court of Portmote is incident to a legal haven, 4 Inst. 148, which must originally spring from the Crown. Henry VIII. granted many franchises of this kind in the counties of Anglesey, Flint, and Caernarvon; stat. 1 Eliz. c. 11. The King having thus the right of appointing ports, stat. 4 Hen. 4, c. 20, was made to strengthen and confirm that right; "all merchandize shall be charged and discharged in the great ports of the sea, and not in creeks and small arrivals." But though the Crown had the power of appointing ports and havens, yet, when once appointed, it had not the power of resumption, or of narrowing and confining their limits: but if once those limits were established, it became lawful to land in any part of such port or haven. This introduced great frauds upon the revenue (by shipping and landing at blind and unknown wharfs and keys, Molloy, l. 2, c. 15), to remedy which, stat. 1 Eliz. c. 11, was made. This(c) restrains the shipping and landing of goods, 1st, In point of time between sun-rise and sun-set. 2dly, In point of place, viz. such open places as should be appointed by commission before 1st September, 1559. The mischief was then the abundance and obscurity of the landing places, not, as at present, the scarcity; and therefore open places are directed to be assigned. A commission issued, 14th June, 1559, and a return, 28th August, 1559, appointing "the places underwritten to be open lading and discharging places," and all others to be abolished; and many regulations are therein made not mentioned in the statute or commission. In the reign of Car. 2, these restrictions were found to be too narrow, but could not be unloosed but by the Legislature: and therefore, by stat. 14 Car. 2, c. 11, sect. 14, power is given to the Crown, from time to time, to assign by commission, "all such further places, ports, members, and creeks, as shall be lawful for landing and discharging goods." And all persons are prohibited to land or discharge goods, &c. "but only upon such *open place, key, or wharf*, as shall be *so assigned," unless by special sufferance from the commissioners of the customs. This restored to the Crown its ancient right of appointment of keys and wharfs, as members of ports and havens, so as it be done by commission, and not, as formerly, by letters patent, &c. In 1667, the present legal wharfs between the Tower and London Bridge were assigned by commission, and the return ratified by Car. 2, 31 August, 1667, and by Jac. 2, A. D. 1686. As trade increased a further extension grew necessary. This gave rise to the sufferance wharfs on the Surry shore, allowed by the commissioners of the customs. The inconvenience of these is, that they exact double fees, that all com-

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modities (tobacco in particular) are not allowed to be landed there, and frauds are more easily committed on the revenue for want of due regulations. This occasioned the present commission, the execution of which is now opposed, 1st, By the owners of both the legal and sufferance wharfs. The legal wharfingers say, that their wharfs, being 1500 feet in length, are fully sufficient for the trade: the sufferance wharfingers swear, that theirs, being 12,000 feet, are also in general employment. The latter allegation destroys the first, and is also a proof of the necessity of more legal wharfs. The legal wharfingers say, that if the present spot, being 750 feet, be converted into wharfs, the old ones will be deserted; and yet they are not deserted now, when 12,000 feet of sufferance wharfs are employed. If this allegation be true, it only proves, that the new wharfs will be more convenient to trade than all the old ones put together. The old legal wharfs are not to be abolished, and the sufferance wharfs may still remain, if thought necessary by the commissioners of the customs. 2dly, The City of London complains, that by an extension the liberties of the city will be violated; their package and scavage eluded; their porters and carmen ruined, and Christ's Hospital, which licences the carmen, impoverished. But their package and scavage duties extend to the whole port of London; their porters and carmen will be equally employed as others, if they work at the same moderate prices; and the sufferance wharfs, which alone will be reduced by this extension, are all out of the liberties, and non-freemen are constantly there *employed. 3dly, The inhabitants of St. Katherine's proceed merely on a mistake, that their houses, situate on the spot assigned, are to be taken from them by this commission. But it is optional, not compulsive; beneficial, instead of a grievance: their ground cannot be turned into wharfs without their consent; but, if they can agree on terms, they may have the privilege of wharfs, which before they were not capable of having. The objections therefore of hardship and inexpedience are ill founded, though neither the Commissioners nor the Court are judges of it: the Crown, the only legal judge, has already determined that question. But, 2. The legal objections to the commission are,—1st, That no new commission can issue, but in such cases where none has issued before, or where the old wharfs are become unfit and useless. The solution is, this strikes at the root of all commissions of extension. The wharfs may be unfit, for want of room as well as from actual decay. Besides, these words are mere inducement in the preamble, and not part of the enacting clause. 2d, The Commissioners are interested or partial; some of them having petitioned for the commission. Solution.—If this were a question of expedience, the objection might have some colour. But that is already decided. In commission of charitable uses, persons interested cannot be commissioners, but complainants, as such, are not excluded. No charge or suspicion of interest in the place assigned. Eight only are under this predicament as petitioners. There are,

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besides, the great officers of State, of the Customs, the Lord Mayor, and twelve Aldermen and collectors of the customs, of the *quorum*. This is a sufficient guard against all fraud or bias. 3d, Some Commissioners are described by their offices, not their names, and the Court cannot take judicial notice who those officers are. Solution.—No pretence, that in fact any man has acted without being in the office named. This objection would vacate the highest commissions in the kingdom: the commission of the peace is often directed to the officer, not the man. It has received the sanction of Legislature in the Act of Regency. 4th, The commission has determined the expedience of an extension, and has not left the Commissioners to judge of it. Solution.—The commission of Car. 2, declares, that the keys and wharfs must of necessity be altered. This a cotemporary exposition, and a precedent. Besides, the Court have determined this point on the former application. 5th, The commission is, to appoint fit and convenient wharfs, whereas the act of Car. 2, says, that the appointment shall be, of *lawful* wharfs. Solution.—The word "*lawful*" must mean such as should hereafter be made so. Otherwise, if none could be appointed but such as were *lawful* before the commission issued, there never could be an extension. Besides, this is warranted by the precedent of Charles the Second's commission. 6th, The commission has determined the particular spot, and left nothing to the discretion of the Commissioners; whereas the word "*assign*" implies an election. This is illegal, and contrary to all precedent; particularly that of *Dover* harbour, 5 Geo. 2. Solution.—*Dover* Case might be proper to be left at large; but it does not follow from thence, that all others must follow it. It is improper to give the commission a power to go all down the river, or to the Kent or Surry shore. A limited discretion is proper. So, in 19 Car. 2, confined to the *Custom-house and places thereabouts*. Here they have a discretion to take the *whole or any part* of the ground described. 7th, The commission hath departed from the powers of the statute Car. 2, in not directing the Commissioners to assign *open* places. Solution.—Deferred till the next head of objection is considered; viz. 3. Legal objections to the return. 1st, It is uncertain, because it has not stated whether the ground be open or covered with buildings. 2d, It has in fact assigned a spot, which is in part covered with buildings. Solution.—Not necessary to state the fact, because immaterial in point of law. This construction would be destructive of the powers of the act. There is no place absolutely *open*, in the sense contended for, within two miles of the *Custom-house*. But whatever be the sense of the word "*open*" it was meant for the benefit of the revenue; and therefore the objection does not lie in the mouths of the present opponents. The statute of Car. 2, does not require the places to be open, when *assigned*; but only, when *used*. The word is purposely dropped in the first clause, and taken up in the second. Convenience of situation is the only thing to be regarded at the *assignment*; the other qualifications are con-

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ditions previous to the *use*. The commission and return do not constitute a legal wharf without the owner's subsequent consent to clear away his buildings. Besides, "*open*" does not always signify "*uncovered*," but "*free of access*." Open fair, open market, open court. Escheaters shall sit in convenient and open places; stat. 1 Hen. 8, c. 8, sect. 3. Sheds, &c. are necessary to preserve goods, yet would make a wharf illegal in the sense now contended for. In the commission for East Cowes, 32 Car. 2, part of a storehouse and shed assigned. The return 1 Eliz. supposes houses to be standing at the assignment, by ordering, that no stranger should be suffered to inhabit thereon after Easter, 1560. And it particularly assigns the ground on which the bridge-house then stood; this is the contemporary exposition. 3d, The place assigned is unfit in its present state. Some part of it cannot be rendered of the intended width without encroaching on the river. And the assignment must be absolute at the time, and not on condition that the place be afterwards rendered fit. Solution.—The only question is, if the *situation* be fit and convenient. The encroachment has been already tried, and adjudged to be no nuisance, in the Case of *Irongate Wharf*. All assignments of new wharfs must be conditional. The owner will not lay it out, and build a key, &c. till he is certain that it will be allowed. In the re*turn, 19 Car. 2, *Dice Key* and *Sommers Key* are, in the same manner, conditional. 4th, A duplicate of the former certificate should have been laid before the Commissioners, according to the usual practice. Solution.—It may be convenient, but the omission would not be fatal. Besides, it appears they had it, for they refer to it. 5th, part only of the ground mentioned in the commission is returned to be *fit*: the rest should have been returned *unfit*. Solution.—The commission requires only that part to be returned, which is found fit and convenient, not that which is unfit. When a general commission issues to establish wharfs in a port, must the return be stuffed with the names and descriptions of every improper place? 6th, The commission is exceeded by making regulations. No such power given in this commission, though there was in that of Cha. 2. And even in that it was illegal, as not being warranted by the statute; but was overlooked, from the emergency of the times, being immediately after the fire of London. Solution.—In Queen Elizabeth's commission there is no such power, yet regulations are made by the return. And the omission in King Charles's commission was perhaps the reason why the return was afterwards confirmed by the Crown. But if allowed to be beyond their powers, still these regulations are no part of the assignment, but merely matter of advice and surplusage. 7th.—The Commissioners have declared all keys unlawful, except those contained in this and the former certificate. This repeals an act of Parliament, which establishes the wharfs above bridge, which are contained in neither of the certificates. Solution.—Wharfs above bridge are not within the port of London; the western boundary of which, by the

return 19 Car. 2, is assigned to be London-bridge. And the declaration of the present commission is expressly confined to all places within the port of London. Wherefore, upon the whole they prayed that the commission and return might be filed.

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*The Court took time to consider of it till the present Term, and then PARKER, C. B., delivered the opinion of the Court.—We are all of opinion, that this commission is not well founded. The designation of ports is part of the King's prerogative. He might make regulations therein by common law in order to secure his revenue: yet, without an act of Parliament, he could not impose new duties. To prevent frauds upon the revenue, the stat. 4 Hen. 4, c. 20, was made; but this, being found inadequate, produced the 1 Eliz. c. 11, which restrains the assignation of wharfs and keys to open places only. This was followed by 14 Car. 2, c. 11, which gives farther powers, but expressly prohibits all lading or unlading except upon *open places*. The power of the Crown to issue this commission depends entirely upon these statutes: and we think that power not well pursued. Not one of the words "*open place, key, or wharf*," is used in this commission. It is therefore materially different from all former precedents. And, as it does not pursue either the power or the precedents, it is not warranted, and must be quashed. The return itself does not find the spots assigned to be "*open places*:" and Lord Hale (in a MS. in Lincoln's-inn library) lays it down, that private houses cannot be assigned for wharfs.

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The commission and return were quashed.

EASTER TERM,—6 GEO. III. 1766.—K. B.

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Corporation of COLCHESTER v. SEABER.

3 C. 3 Burr. 1866.

THE Corporation of Colchester by a series of illegal elections was so reduced, that no subsequent election of magistrates could be made, and was therefore in common acceptance dissolved, and a new charter was granted by the Crown. And now, upon an action brought by the new Corporation (a), the question upon a case reserved was, whether the new Corporation succeeded to all the rights of the old one.

LORD MANSFIELD, C. J.—The fact has, and may often happen, that by judgment of *ouster* against persons illegally elected, no regular election can again be had, and the corporation

Corporation, being disabled to act, and therefore accepting a new charter, is not dissolved, but dormant; and, after such acceptance, is the same corporation as before: [and may sue on a bond given to the original corporation.]

(a) It appears from the report in 3 Burr., that it was an action of debt on a bond executed to the old corporation, in 1735; that, in 1740, judgments of *ouster* were had against the persons then claiming to

be mayor and aldermen, and that they were all dead in 1763; that from 1740 to 1768, no person had acted as such, and that the new charter was granted in 1763, 3 G. 3.

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[*592] is commonly said to be thereby dissolved. But till this case it was never doubted, but that by a new charter it was revived, unless where there is a change in the name or constitution, and even there, it has been determined to be still the same. It now comes on without a *dictum* in the books, by way of authority, to support the doubt: but it is said to be meant, as a ground for an application to Parliament, to determine, that what shall here be determined to be law, is unjust, and ought to be remedied. If such an application should be necessary for this corporation, the remedy ought to be universal, and extend to all corporations. But I am of opinion, that the corporation is not dissolved, but only deprived of its magistracy. The free-men are still entitled to their right of common, to votes for members of Parliament, &c. These privileges are not lost by the *ouster* of a mayor. *Sir *James Smith's Case*, in Shower (b) and 4 Mod. 52, is in point. The corporation is rather in abeyance, when it cannot act, than dissolved, and may be revived by a new charter.

WILMOT, J.—When a corporation accepts a new charter, it remains the same as it did before; *Haddock's Case*, Raym. 435; *Case of Scarborough*, 3 Lev. 237. If the corporation were dissolved, the lands would revert to the donor; and the King, by his new charter, could not divest those rights, and regrant them to the new corporation. But, if only *dormant*, no such inconvenience follows.

YATES, J.—Of the same opinion; and cited *Lutterel's Case*, 4 Rep. 87 b; *Case of Wells*, 1 Lutw. 508.

ASTON, J.—Of the same opinion (c).

(b) 2 Show. 263, 274, by the name of *R. v. Mayor of London*; Skin. 293, 310; 12 Mod. 17; Holt, 168, S. C.

(c) It has been determined, in a subsequent case, that when an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no means of restoring it, or of doing any corporate act, the corporation is dissolved to certain purposes; that is, it is so far dissolved, that the Crown may grant a new charter to a different set of men: and it is not necessary that it should be accepted by a majority of the remaining members of the old corporation; it is sufficient, if it be accepted by a majority of the grantees; *R. v. Pasmore*, 3 T. R. 199, where all the cases on the subject are fully considered, and particularly the principal one. Lord *Kenyon*, C. J.—“It has been said, that in the case of the Mayor of *Colchester v. Seaber* it was determined, that the old corporation was not irrevocably gone, though they had lost their magistrates. Lord *Mansfield* did not say in that case, that the corporation could act, or that it was not dissolved to some purposes; but only that the King might renovate it, and when renovated, all the

former rights would revive and attach on the new corporation, and amongst others the right of suing on the bond given to the old corporation.” *Buller, J.*—“It was there thrown out, that the old corporation would not lose their rights of common and certain other rights. With regard to the rights of common, it was probably taken from a case in 2 Lord Raym. 953, where Lord *Holt* is supposed to have given such an opinion. But no authority is there cited for it. But if such a right were claimed, let us consider how it could be supported. If it were granted to them as a corporation, the persons claiming it must shew that there is a corporation in existence. And if they claim by prescription, they must set it up in the name of the old corporation: But it cannot be set up in the names of persons who do not exist. Another case there mentioned is that of the Corporation of *Scarborough*, where it was said, that debts due to the first corporation remained, notwithstanding a change of name. Of that, no doubt can be entertained: for if the King intended to give rights to the new corporation, which were enjoyed by the old one, it was undoubtedly competent to him to do so. And this is the amount of what I suppose the Court intended to

Lord MANSFIELD, C. J.—The statute of the 11 Geo. 1(d), arose from a constitutional jealousy, that, if corporations could only be revived by the King's charter, it might be in the power of the Crown to garble all such corporations. Therefore the act puts it in the power of the body to revive themselves.

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decide in the *Colchester Case*." *Grose*, J.—"I have attentively considered that case; and it appears to me, that the true question there was, whether the new charter did not so far revive the rights of the old corporation, as to give power to the new corporation to sue for them. The Court thought that it did; and if it were otherwise, the consequences would be fatal to almost all the corporations in the kingdom; for there is hardly any, which have not at some time or other been dissolved in that point of view; and all those would lose their prescriptions. The Court indeed did seem to think in that case, that the corporation was not dissolved to any purpose: but, on looking into the cases there cited and relied on, they will not be found to warrant that general proposition."

While a corporation exists capable of discharging its functions, the Crown cannot obtrude another charter upon them; they may either accept or reject it; *Id.* 240. And where the King grants a charter to a corporation, there being a prior charter existing at the time, the new charter is void *ab initio*: because two corporations for the same purposes of government cannot exist within one and the same place, and at one and the same time; *R. v. Amery*, 2 Bro. P. C. 336, (Tomlin's ed.); and see *S. C.* 1 T. R. 575, 2 T. R. 515. See also *R. v. Morris*, 3 East, 218, 4 East, 17; *R. v. Mayor of Monmouth*, 4 B. & A. 496; *Vin. Abr. Corporations*, (I); *Bac. Abr. Id.* (G); *Com. Dig. Franchises*, (G 4, 5).

(d) C. 4.

ECCLESAL BIERLOW v. WARSLOW.

S. C. Burr. Sett. Ca. 562.

SAMUEL Wilshaw and two children were removed from Warslow to Ecclesal. Order confirmed on appeal, stating, "That the pauper, S. Wilshaw, being sixteen years old, was bound by the parish an apprentice to Wm. Ashfuth, at Ecclesal, for eight years: that he resided there under that indenture for five years, and, being then twenty-one, he and his master agreed to cancel the indentures, which was done accordingly. The pauper was then hired for a year to Robert Meller, of Warslow, and served there for a year under that hiring, and received his year's wages, and has gained no settlement since." Objected, that the indentures could not be cancelled without consent of the parish. But by

Parish apprentice may agree with his master to cancel his indentures at 21, though bound till 24, [without the consent of the parish.]

* Lord MANSFIELD, C. J.—There is no authority, that the consent of the parish is necessary for that purpose, neither is there any reason.

WILMOT, J.—The reason why the act(d) extended the term to twenty-four was, that parishes might put out children at less expence; because the latter part of the time is most advantageous to the master. Another reason was, because they could not bind an infant beyond the age of twenty-one without the aid of the act, which prevents such contract being rescind-

(d) 43 Eliz. c. 2, s. 5. But now by 18 G. 3, c. 47, parish apprentices shall only be bound till they come to the age of twenty-one years. And see further pro-

visions as to binding out parish apprentices, 54 G. 3, c. 107; 1 & 2 G. 4, c. 32; *R. v. Tunstead*, 3 T. R. 523.

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ed without the consent of the master. But the act leaves the parties, when both are of full age, to act as they please.

YATES, J.—This is a strange objection to come from a parish not party to the indentures.

Orders quashed (e).

(e) *R. v. Harberton*, 1 T. R. 139, S. P. But if the apprentice be under age, the apprenticeship cannot be dissolved without the consent of the parish officers; *R. v. Austrey*, Burr. Sett. Ca. 441. Where a parish apprentice was, before the passing of 18 G. 3, c. 47, (preceding note), bound till twenty-four, and served till nearly attaining twenty-one, when his master, being about to leave the parish, and no longer wanting his service, told him he might leave him and go where he liked and shift for himself; but if he could not provide for himself, he might return to him; upon

which he quitted, and when he was about four months past twenty-one, bound himself by indenture as apprentice to another master for three years, and served with him the three years: he did not gain a settlement by service under the second indenture: inasmuch as there did not appear to have been any dissolution of the first contract, and therefore he was not *vis juris* at the time he entered into the second; *R. v. Bos*, 4 M. & S. 383. As to apprentices generally, see *Gray v. Cookson*, 16 East, 13; 54 G. 3, c. 96, and *R. v. St. Luke's*, ante, 553.

CARTER v. BOEHM.

S. C. 3 Burr. 1907.

Concealment of private facts, not of public facts, or conclusions from facts, will vacate a policy.

ACTION on a policy of insurance made at London, 9th May, 1760, at 4 *per cent.*, interest or no interest (f), upon Fort Marlborough, alias Bencoolen, in the East Indies, for twelve calendar months, from 1st October, 1759, to 1st October 1760, against any European enemy: On 3d April, 1760, the fort was taken by the French.

LORD MANSFIELD, C. J., delivered the opinion of the Court on a motion for a new trial; the jury having given a verdict for the plaintiff, who was Governor of Bencoolen.—To impeach this verdict it is insisted, that the not mentioning certain particulars at the time of insurance was a fraudulent concealment and vitiated the policy. I shall therefore consider, 1. The nature of concealments: 2. Apply them to the present case.

[*594] 1st. Insurance is a contract on speculation: the special facts usually lie in the knowledge of the insured only. The underwriter trusts to him, that he conceals nothing, so as to *make him form a wrong estimate. If a concealment happens without any fraudulent intention by mistake of the principal or his agent, still the policy is void, because the risk, which is run, is not that which the underwriter intended. So if the underwriter knew that the ship was arrived, the contract is void as to him (g). But *aliud est celare, aliud tacere*. There are many matters as to which the insured may be innocently silent: 1. As to what the insurer knows, however he came by that knowledge; 2. As to what he ought to know; 3. As to what lessens the risk. An underwriter is bound to know political perils, as

(f) Stat. 19 G. 2, c. 37, s. 1, which makes insurances "interest or no interest" void, extends only to insurances made on ships, and goods laden on board such ships.

See ante, 277, n. (b).

(g) "And an action would lie to recover the premium;" per Lord Mansfield, S. C. 3 Burr. 1909.

to the state of war or peace, &c.(h). If he insures a privateer, he need not be told her destination. And as men reason differently from the same facts, he need not be told another's conclusion from known facts. The question must always be, whether at the time there was a fair representation or concealment of the facts.

2. As to the present case: I had a doubt on a former trial on this policy, whether an insurance by the governor of a fort was good, on the same principle as the case of seamen's wages(i). But Fort Marlborough was only a mercantile factory, not a military fortress. The objection was not insisted on at this trial. If it had, we are all of opinion, it would not vacate the policy. The fort was only defensible against the natives: Its only security against European force was the difficulty of entering the harbour. The state of the fort was generally well known. There was no apprehension of an attack till the French attacked Nattal in February, 1760. It was taken 21st April, 1760, by Count D'Estaing, piloted by Dutch pilots. No evidence of any such design till the end of March, 1760. The Governor turned all his money into goods in the end of February, 1760, and lost much more than he insured. At the trial the defendants relied on some letters from the Governor to the India Company and to his brother, intimating that the French had a design, the year before, to attack the fort, and that he apprehended they might resume it again, and therefore giving orders to insure; which was not communicated to the underwriter. They relied also on the opinion of the broker, that these facts ought not to have been concealed. But we think the verdict well founded.

*The risk depended on the chance, whether any European power could attack the place by sea. Of this the insurer in London could judge better than Governor Carter in the Indies. The state of the French marine was better known here than there. He insures against the general contingency of an attack by any European power. No such design existed in September, 1759, when orders were sent to insure.—Consider the several concealments objected. 1st, He did not disclose the condition the place was in. The underwriter knew the governor himself insured, and could not in duty disclose it. He therefore took upon himself the knowledge of that fact. But the fort, it is said, was not in the condition it ought to be. That condition ought only to be to resist an Indian force: it was notorious it could not resist an European attack. Wherefore we are all of opinion, that in this point the verdict is good. [*595]

(h) See *Eden v. Parkinson*, 2 Doug. 732 a.

(i) It has been expressly decided, that a sailor can neither insure his wages, nor any commodity he is to receive in lieu of wages; *Webster v. De Tastet*, 7 T. R. 157. But the captain of a ship in the African trade may insure his "commission, privileges, &c." *Mansfield, C. J.*—"The chief

pay of captains in many trades, as for instance the East India trade, being the privilege of carrying out investments to the settlement to which they are bound, and there making the best advantage of them in their power, it would be absurd to say, that such investments were not the subject of a legal insurance;" *King v. Glover*, 2 N. R. 206.

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2dly, He declares in his letters, that he imagined, that, as the French could not relieve their friends on the coast, they would attempt Fort Marlborough. This was mere speculation of the governor, and not a matter of fact. 3dly, That a letter to Mr. Winch was concealed. What were the contents of that letter does not appear. Taken in the strongest light, it is only supposed to be an intelligence of a design to surprise it the year before, but then dropped. It is said, that, if the insured knows of a design by a privateer to attack a ship, the concealment would be fraudulent. I agree it; but not if designed a year before, and dropped. A design, which had transpired and was dropt, was not likely to be renewed by a vanquished enemy. 4thly, a stronger objection is, that the governor suspected a Dutch war, and did not disclose his suspicions. This arises from political speculation only, and need not be communicated. It was therefore given up at the bar. As to the opinion of the broker, it was no evidence; being merely opinion, and formed after the event had happened. *The governor's behaviour appears to be fair in all respects: his subsequent conduct shews that he thought the danger improbable. If the defendant's objection prevails, the rule against concealment would be an instrument of fraud. He took the premium without asking questions, knowing that if such concealment vacates the policy, it was thereby void, and drew the governor in to suppose himself insured when he was not so. He waived the objection then, and shall not now take it up. We may say of this rule, as has been said of the statute of frauds: "It shall not itself be turned into an instrument of fraud."

Rule *nisi*, for a new trial, discharged (k).

(k) The principles laid down in this case have been recognized and confirmed in several subsequent decisions. As if an insurance be made before the commencement of hostilities, but when every body expects a war immediately, the insured is not bound to give the underwriter notice, though the ship do not sail till after the war takes place; and the underwriter is liable in case of capture; *Planche v. Fletcher*, 1 Doug. 251. So the insured is not bound to disclose a circumstance made material by a foreign ordinance, of which he was ignorant. If the underwriter knew of it, he might have enquired, whether it had been complied with: but if both be ignorant, both are innocent, and in such case the underwriter must run all risks; *Mayne v. Walters*, Park's Ins. 306 (ed. 1817), Marsh. Ins. 478 (ed. 1808). So there need be no previous representation of the state of a ship: and therefore letters describing her bad state in her outward voyage need not be shewn to the underwriters in a policy on a homeward one. Lord Mansfield—"It is a condition, or implied warranty, in every policy, that the ship is sea-worthy; and therefore there is

no necessity for a representation of that. If she sail without being sea-worthy, the policy is void;" *Shoolbred v. Nutt*, Park's Ins. 346, Marsh. Ins. 475; *S. P. Eden v. Parkison*, 3 Doug. 735. And on the authority of this last cited case, as well as on principle, it was held, that whatever forms an ingredient in sea-worthiness is not necessary to be disclosed by the assured to the underwriter in the first instance, unless information upon the subject be particularly called for; and then the assured must disclose truly what he knows in the respect required; *Haywood v. Rodgers*, 4 East, 590, where Lord Ellenborough recognises and approves of the doctrine laid down in *Carter v. Boehm*. So where the latest letter of advice was shewn to the insurers, containing a true account of the then state of the ship, and in which a *prior* letter was referred to; the not having communicated such prior letter was held not to vitiate the insurance; as the insurers might have enquired for that letter, and must have been cognizant of the usage of that particular trade; *Freeland v. Glover*, 7 East, 457. It is not incumbent on the assured to communicate

to the underwriter the circumstance of a ship being foreign built; *Long v. Bolton*, 2 Bos. & P. 209; and see *Bridges v. Hunter*, 1 M. & S. 15; *Gladstone v. King*, Id. 35; *Foley v. Moine*, 5 Taunt. 430, 1 Marsh. R. 117; *Vallance v. Dewar*, 1 Camp. 503; *Campbell v. Innes*, 4 B. & A. 423. But see Mr. Serjeant Marshall's observations on the case of *Carter v. Boehm*, where he says, that he has not been able

to satisfy his mind, that the judgment is warranted even by the principles which Lord Mansfield lays down as the basis of it; 1 Marsh. Ins. 483.

As to what frauds and concealments will vitiate a policy of insurance, the reader will find all the cases collected, and the distinctions accurately defined, in Park's Ins. ch. x. p. 283; and also in 1 Marsh. Ins. ch. xi. p. 464.

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GULLIVER on the demise of TASKER v. BURR.

A. DEMISES to B. from year to year, commencing the 10th of October. B. dies the 27th August: A., the 9th September, gives notice to the executor to quit at the end of the Term: Query, If the notice is sufficient? The Court held clearly, that in a common case it would not be sufficient notice (*l*); but in the case of an executor they doubted. But Lord MANSFIELD inclined strongly, that the nature of the contract being to hold from year to year, unless reasonable notice was given on either side, and notice not having been given in reasonable time; the executor was bound to keep the farm, if required, another year: and therefore is at liberty to keep it if he chooses it (*m*).

A month's notice not sufficient to quit a lease from year to year. And if the party die, it is not sufficient to the executor.

(*l*) *Doe dem. Dagget v. Snowden*, post, 1224, and notes.

(*m*) This opinion is confirmed in *Parker dem. Walker v. Constable*, 3 Wils. 25. So the lessee of a tenant for life is entitled to regular notice from the remainder-man; *Roe dem. Jordan v. Ward*, 1 H. Bla. 97.

So an administrator has the same chattel interest as his intestate had in a tenancy from year to year, and cannot be dispossessed by his landlord without regular notice; *Doe dem. Shore v. Porter*, 3 T. R. 13. So of an infant heir; *Maddon v. White*, 3 T. R. 159.

DUNCHURCH v. SOUTH KILWORTH.

S. C. Burr. Sett. Ca. 553.

ELIZABETH TANSUR was removed from South Kilworth to Dunchurch. Order confirmed at Leicester Sessions, stating, "That Edward Tansur, the pauper's husband, was certificated from Dunchurch to South Kilworth, where he resided with his wife and family till his death. It appeared by parol evidence of the pauper and her son (which was objected to by the respondents' counsel), that twenty-five years ago, the pauper and her said husband were joint purchasers of a house, &c. at S. Kilworth, for 19*l*.; that Edward Tansur laid out about 15*l*. more to repair it, and built a new shop, and was taxed at the value of 30*l*., and resided therein to his death; after which, the pauper continued ten months in possession, and then went to service for five years, and let the premises to her son for 20*s*. a year, but declared she could have let it for 30*s*. to other persons: That the pauper, when she left her service about three years ago, returned to her house at S. Kilworth, and soon after sold the garden place for 20*l*. 3*s*. 6*d*., and, by deed

Subsequent improvements by a certificate-man no part of the purchase money.

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of gift, gave her son Walter part of the yard to build a house upon. By feoffment, 8th November, 1763, in consideration of natural affection and 10*l.*, she granted the residue of the premises to her son Edward, to the uses following; *viz.* As to two chambers, to the use of herself for life *sans waste*, remainder to Edward in fee; and as to the residue to the use of Edward in fee: and Edward covenanted to keep the whole in repair. The pauper continued to dwell in her own part of the house, till she applied for relief; and being told, that she could not be removed to Dunchurch, while she lived on her own freehold, she went out of her house for a little time, and went to her daughter's house in the same parish, and set her own chambers to her son for 6*d.* a year; and was relieved at her daughter's house by the parish officers about a week, and was then removed."

LORD MANSFIELD, C. J.—The whole turns on the single point, whether this was a purchase for 30*l.* [There is] no room for the presumption that it came by descent, for the contrary is found. There was no fraud in removing from her house. It was necessary to be done, else she could have had no relief(*n*): she must have sold her freehold. As for the Case of *All Saints and Bengoe*, which was cited to shew that money afterwards expended shall be reckoned as part of the purchase, no determination was ever had thereon. And I cannot conceive such an interpretation can be put on the statute. If subsequent events, and money afterwards laid out, are to be taken in, all the uncertainty would ensue which was intended to be re*medied. Yet no doubt but the payment of a fine or money borrowed upon mortgage is part of the purchase-money(*o*).

WILMOT, J.—A joint purchase is a purchase of the entirety to the husband and wife. We must not enter upon questions of real value. The only touchstone is, was 30*l.* *bona fide* paid? Subsequent improvements can have no retrospective operation. As long as she continued in her chamber, the parish need not relieve her. Therefore she very properly went out of it. And undoubtedly she might be removed from the parish, not residing in the house which was her own(*p*).

YATES, J., and ASTON, J., of the same opinion.

Orders confirmed.

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A fine, or money borrowed on mortgage, is part of the purchase-money.

A pauper may be removed from a parish, in which she has a freehold, not living therein.

(*n*) *Ante*, 433, *n*.

(*o*) *Ante*, 435, *n*. (*d*).

(*p*) Lord Kenyon observed, upon this part of Mr. J. Wilmot's judgment, that it being a purchase under 30*l.*, the act of the 9 G. 1, c. 7, intervened, which provides that the purchaser shall continue irremovable no longer than while he shall inhabit *in such estate*; in *R. v. Houghton-le-Spring*, 1 East, 250. The learned reporter also, in a note, observes of the abstract in the margin—"Whether this were written by the learned Judge himself does not appear. The work was published by his executors;

but see the preface, p. 28;" *Ibid.* *n*. (*c*). In that case it was decided that a pauper having a freehold, which he had not acquired by *purchase*, in the popular acceptance of that word (in that case it came to him by *descent*), will gain a settlement by forty days' residence either upon his own property, though then let to a tenant, by permission of such tenant, or by a like residence in any other part of the same parish; *Id.* 247; *S. P. R. v. Staplegrave*, 2 B. & A. 527. See also *R. v. Stanfield*, Burr. Sett. Ca. 205, and *Over-Norton v. Salford*, *ante*, 433.

TRINITY TERM,—6 GEO. III. 1766.—K. B.

ILMINGTON v. MICKLETON.

S. C. Burr. Sett. Ca. 586.

ELIZABETH EVANS, widow, was removed from Mickleton to Ilmington. On appeal, the Sessions confirmed the order, stating, "That Theophilus Evans, being settled in Ilmington, about 1733 married said Elizabeth (then Elizabeth Stanley), who, by indenture 25 March, 1724, had purchased a * leasehold tenement in Mickleton, for the remainder of a term of 1000 years, at the price of 6*l.*, and resided thereon nine years. After the intermarriage, the husband and wife resided thereon sixteen years, when said Theophilus died, leaving said Elizabeth his widow, who continued to reside there till Christmas, 1765, when she sold the same for 6*l.*

Husband of a woman, who, when sole, had purchased for less than 30*l.*, gains a settlement by marrying her, and then communicates that settlement to his said wife.

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Et per tot. Cur. (on the authority of *Kentisbury* and *Marwood* (a), Hil. 29 Geo. 2). This was a settlement to the husband by his intermarriage (b), and from him derived to his widow; though, upon the statute 9 Geo. 1, [c. 7], she gained no settlement by her purchase when originally made. And therefore,

The orders were reversed (c).

(a) Burr. S. C. 386, Say. R. 268, S. C., in which case the Court were of opinion, that 9 G. 1, does not extend to devises, or gifts or other methods of acquisition, but is confined to purchases for money-considerations under 30*l.* See *R. v. Brungwyn*, 2 Bott. 637.

(b) See *R. v. Offchurch*, 3 T. R. 114.

(c) Inasmuch as the husband acquired the estate by marriage and not by purchase in its ordinary meaning, i. e. by buying; and the settlement of the husband

was communicated to the widow. "For generally speaking in the case of a purchase, if the value be under 30*l.* no settlement can be gained by virtue of it; that is where it comes to the party by his own act: but if it comes to him by operation of law the value is not material;" Per Lord Kenyon, in *R. v. Edington*, 1 East, 288. See *R. v. Tarrant Launceston*, 3 East, 226, and *Dunckurch v. South Kilworth*, ante, 596.

SIMON v. METIVIER OR MOTIVOS.

S. C. 3 Burr. 1921; Bull. N. P. 280.

CASE for not taking away certain drugs to the value of 110*l.*, which were bought by the defendant at an auction; and having since sunk in their value, he refused to take them, and they were resold at an under price; and this action was brought to recover the difference. It appeared on evidence, that, by the terms of the sale, if 6*d.* was not tendered by the buyer, the goods might be put up again and resold: That no 6*d.* was paid, but that the auctioneer took down the price, and buyer's name in writing; and that after the day of bidding, and before the day of payment, the goods were weighed off to a servant of the defendant. The jury found a verdict for the plaintiff.

Sales by auction, where the buyer gives in his name, good within the statute of frauds. *Semble*, that the statute extends to sales by auction.

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*
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Stowe and *Davenport* moved for a new trial: because the sale was void by the statute of frauds(d), being above the value of 10*l.*, and no earnest given, or note or memorandum signed by the party: and because there was no mutuality in the contract; for, as no 6*d.* was paid, the seller was not bound by it, and therefore not the buyer. The plaintiff might, and actually did, resell the goods according to the conditions of the sale.

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* *Norton* and *Wallace* shewed for cause, that the conditions of sale, and the auctioneer's taking down the name of the buyer and price, are equivalent to a note in writing. That the auctioneer was agent to the buyer *pro tempore*; that his giving in his name was an authority to the auctioneer to set down the contract. That the not paying the 6*d.* was the defendant's own laches, of which he shall take no advantage. That the intent of the statute of frauds was, to suppress private fraudulent contracts supported by perjury. No such inconvenience in sales by auction, which are transacted in the face of such numbers, that a man cannot, by false evidence, be made a purchaser whether he will or not. That the terms and conditions of the sale, when any one bids, are the terms of the bidder as well as the seller. The buyer thereby accedes to the terms proposed, and could bring an action upon them, if not performed.

Exceptions to
the statute of
frauds.

Lord MANSFIELD, C. J.—The question is singly upon the statute of frauds, whether the contract is void by the provisions of that positive law. The object of the Legislature in that statute was a wise one; and what the Legislature meant, is the rule both at law and equity; for, in this case, both are the same. The key to the construction of the act is the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it; more instances have indeed occurred in Courts of equity than of law, but the rule is in both the same. For instance, where a man admits the contract to have been made, it is out of the statute; for here there can be no perjury. Again; no advantage shall be taken of this statute to protect the fraud of another. Therefore, if the contract is *executed*, it is never set aside. And there are many other general rules by way of exception to the statute.

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There are two lights in which the present case may be considered. 1st, Whether sales by auction are within the statute. * They certainly existed in England, and in all other countries, at the date of this statute. The auctioneer is a third person, who is, to many intents, the agent of both parties. The solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The contract is executed when the hammer is knocked down. I remember a case where some sugars were bought at an auction, and afterwards consumed by fire in the

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auction warehouse, and the loss fell upon the buyer (e). The circumstance of *weighing off* is similar to this, and very material in the present case. And, according to the inclination of my present opinion, auctions in general are not within the statute: But this is not necessary to be now determined, for, if they are within it,—2d, The requisites of the statute are well complied with. Every bidding is an accession to the conditions of sale. The name is put down by the buyer's authority. No latitude is left to fraud and perjury from the loose memory of witnesses.

WILMOT, J.—It may be a great question, whether sales by auction are within the statute. They were certainly not meant by the act, which was to extend only to the mischiefs created by private and clandestine sales. Had the statute of frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing, frauds. I therefore incline to think sales by auction openly transacted before 500 people are not within the statute. But the present agreement is strictly within the restrictions of the act. As to the objection for want of mutuality, that power of re-selling was optional in the seller, if he pleased to require the earnest, and it was denied. And the meaning clearly was, that, upon refusal, goods may be instantly put up again. Not being asked, the contract clearly bound the seller without it, and therefore shall bind the buyer. The weighing it afterwards is a very corroborating circumstance. I remember the case of the sale of some balsam, which was weighed and put into a pot of the seller, *instead of a pitcher which the buyer had brought, and left at the seller's shop. This was held a sufficient delivery to bind the contract. [*602]

YATES, J.—I much doubt whether the contract was within the statute of frauds. If it was, I am clear that the requisites of the statute were duly observed. Where Sir Thomas Osborne bespoke a chariot (f), that being in its nature not deliverable immediately, it was held not within the statute; because not capable of all the requisites of the statute. I look upon this contract as executory in its nature, and being to be executed within a year, is so far not within the statute (g).

ASTON, J.—I think the terms of the sale and the requisites of the statute were fully complied with, by giving in his name as a purchasor, which is better than the sixpence earnest.

Rule nisi, for new trial, discharged (h).

(e) S. P. where goods sold by auction were consumed by fire in the King's warehouse; *Hinde v. Whitehouse*, *infra*, n. (h); or a factor's, *Phillimore v. Barry*, *Ibid*.

(f) *Towers v. Osborn*, 1 Str. 506; *Clayton v. Andrews*, 4 Burr. 2101; *Groves v. Buck*, 3 M. & S. 178, *acc*.

(g) But see *Rondeau v. Wyatt*, 2 H. Bla. 63; *Cooper v. Elston*, 7 T. R. 14, *contra*. See *Fenton v. Emblers*, *ante*, 353,

as to contracts to be performed within a year.

(h) On this case Lord Ellenborough observed, "that the only part of it which he meant to question, though it was unnecessary then to decide upon it, was the opinion thrown out, that auctions were not within the statute, of which he should reserve his approbation for future consideration. But as to the other point there de-

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cided, that supposing sales by auctioneers or brokers to be within the 17th sect. of the statute, the auctioneer or broker must be taken to be the agent of both parties; the practice had become so settled since the decision of that case, that it would be dangerous to shake it, and it was not his intention to question it; *Hinde v. Whitehouse*, 7 East, 558; *S. P. Phillimore v. Barry*, 1 Camp. 513. So if the sale be of an interest in lands within the 4th sect.; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; per *Ld. Eldon*, C., in *Coles v. Trecothick*, 9 Ves. J. 249. But in *Hinde v. Whitehouse*, it appeared, that the catalogue of the articles, and the conditions of sale were contained in two separate papers, neither connected externally nor internally by any relation of one

to the other, and therefore that the auctioneer's writing the name of the highest bidder on the catalogue, was not a sufficient compliance with the statute, so as to make the contract binding: but that the acceptance by the buyer of samples, which by the terms of the sale were treated as part of the entire bulk to be delivered, was such an acceptance of part as would satisfy the statute. In *Phillimore v. Barry*, the auctioneer wrote the initials of the name of the buyer's agent opposite the lots purchased by him, and the principal recognized the purchase in a letter to the agent, and it was held, that the entry by the auctioneer, coupled with the letter, was a sufficient memorandum. See also *Symonds v. Ball*, 8 T. R. 151.

THE KING v. WINGFIELD.

Person indicted for not repairing roads *ratione tenuræ* shall pay the costs of the prosecutor.

INDICTMENT for not repairing a road *ratione tenuræ* (i). The defendant had applied to the Court for leave to plead guilty, and submit to a small fine; on a certificate (k) that the road was repaired. This being denied, he pleaded not guilty, and the indictment went to trial, when the defendant was convicted; it appearing, that, at the time of the presentment and subsequent application to the Court, the road was out of repair, but was repaired before the trial. And now it was moved that the defendant might submit to a small fine, without payment of the prosecutor's costs, on the authority of the *King* and *Cheshunt* (l). But the Court, on the circumstances of the case, refused to set a small fine, unless the defendant paid the prosecutor's costs subsequent to the prior application (m). It was said, that the reason of not usually giving costs in these cases was, because the statute Will. 3 (n), directs the fine to go to the repair of the road: * but the Court held, that this did not extend to repairs, *ratione tenuræ*; the fine, in this case, being to be paid to the surveyor of the parish highways (o).

Fines for not repairing roads, to whom payable.

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(i) This indictment must have been removed by *certiorari*. As to roads repairable *ratione tenuræ*, see 13 Geo. 3, c. 78, s. 23; *R. v. Balme*, 2 Cowp. 648; and as to roads repairable *ratione tenuræ* becoming turnpike roads, see 13 G. 3, c. 84, s. 62.

(k) *R. v. Mawbey*, 6 T. R. 619.

(l) *Ante*, 295.

(m) By 13 G. 3, c. 78, s. 65, the Court, before whom any indictment or presentment shall be tried, may award costs to the prosecutor, if it shall appear that the defence was frivolous; or to the defendant, if it shall appear that the prosecution was vexatious. On an indictment removed by *certiorari*, the Court above has no power to award costs, but only the Judge at *Nisi*

Prius; *R. v. Chadderton*, 5 T. R. 272. But the Judge's certifying that the defence was frivolous, is a sufficient awarding; *R. v. Clifton*, 6 T. R. 344. The Sessions may enquire and determine who in fact are the prosecutors of an indictment tried before them; *R. v. Commerill*, 4 M. & S. 203; and see *R. v. Inceledon*, 1 M. & S. 268; *R. v. Tamton St. Mary*, 3 M. & S. 465.

(n) 3 W. & M. c. 12, s. 14.

(o) By 13 G. 3, c. 78, s. 47, no fine, issue, penalty or forfeiture for not repairing highways shall be returned into the Exchequer, &c., but shall be levied by and paid to such persons residing in or near the parish, &c., where the road shall lie, as the Court imposing the same shall order,

to be applied towards the repair of such highways. See *R. v. Townshend*, 2 Doug. 420; *R. v. Just. of Lancashire*, 12 East, 366. The Court cannot impose more than one fine; *R. v. Machynlleth*, 4 B. & A.

469, and *R. v. Old Malton*, *Ibid.*, n. But the defendants shall not be discharged by submitting to a fine, but a *distingas* shall go in *infinium* till they repair; 1 Hawk. P. C. c. 76, s. 94.

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WHEELER v. COOPER.

TRESPASS for taking some pewter by distress. On a special justification, and issue thereon, a verdict was found for the plaintiff on the following case reserved. The trustees of a turnpike road in Derbyshire had by virtue of their powers altered a road, which ran through the parish of Middleton, and carried it through part of the parish of Hyam; and the defendant, the officer of the trustees, had distrained the plaintiff's goods, he being an inhabitant of Hyam, for not doing statute work (p) on the said new made road.

Inhabitants of a parish, into which a road is turned by turnpike trustees, not bound to do statute work thereon.

LORD MANSFIELD, C. J., held that the roads, being by the act to be repaired in the same manner and by the same persons as were formerly used to repair them, the inhabitants of Hyam could not be obliged to repair the new made road; but whether the inhabitants of Middleton should be bound to repair this, as the old road still subsisted, he gave no opinion; but rather inclined that they should not (q).

WILMOT, YATES, and ASTON, Js., of the same opinion.

Postea to the plaintiff.

(p) 4 G. 4, c. 95, s. 80, *et seq.*

(q) This case seems to have turned upon the construction of a particular act of Parliament. But in the following case it was held, that where under a local act a road had been turned and carried through the township of N., that township was liable to repair it, although the act directed, that the roads should be repaired with the money arising from the tolls; for the tolls were held to be only an auxiliary fund in the hands of the trustees, and the township, being bound by prescription to repair all roads within the same, was primarily liable; but it might obtain relief against the trustees under 13 G. 3, c. 84, s. 33, (now repealed by 3 G. 4, c. 126). There *Abbott*, O. J., said, "By the general rule of law, the inhabitants of any district, who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway;" *R. v. Netherthong*, 2 B. & A. 179. It also seems, that the inhabitants of Middleton were not bound to repair, unless it could have been shewn, that there was a consideration for their repairing. For on an indictment against the inhabitants of A. for non-repair of a highway lying therein, a plea, that the inhabitants of B. had immemorially repaired and of right ought to repair, was held bad for not

stating a consideration. *Ld. Ellenborough*; "The principle of law I take to be clear, that the inhabitants of a parish are liable of common right to repair the highways lying within it, unless they can shew that this burden is cast upon some other person, under an obligation equally durable with that which would have bound the parish; which obligation must arise in respect of some consideration of a nature as durable as the burden cast upon them." *Holroyd*, J.; "When the highway lies out of the parish, a consideration must be shewn;" *R. v. St. Giles*, 5 M. & S. 260, where most of the cases on this point are referred to: see also *R. v. Machynlleth*, 2 B. & C. 166. *Ld. Hardwicke*, C., was of opinion, that where a new road has been once made by an individual, under a writ of *ad quod damnum*, in the same parish as the old road stopped up, the parishioners are bound to repair it: but if in another parish, the person suing out the writ and his heirs ought to repair it; inasmuch as that parish would have a new burden thrown upon them, and no recompense by the former road being taken away: in *Ex parte Fenner*, 3 Atk. 771. See further as to highways, *R. v. Ja. of Wills*, *ante*, 467; *R. v. Wingfield*, *ante*, 602; *Pockin v. Pawley*, *post*, 670; and 1 Hawk. P. C. c. 76.

THE KING v. LLANVERRAS.

S. C. Burr. Sett. Ca. 571.

Renting 10*l.* a year, and immediately letting off the greater part to an under-tenant, and residing on the rest, gives a settlement.

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PAUPER was sent by order to Llanverras, and Sessions confirmed the order, stating "That in 1764, Evan Hughes, the father of the pauper, being settled in the parish of Northop, rented in Llanverras a tenement of 10*l.* *per annum*, *and paid rent for the same, and lived for forty days in part of it, of the value of 40*s.* *per annum*; and immediately after the taking let the rest to under-tenants, and never lived thereon a moment."

Kenyon and *Dunning* argued, that this was no settlement at Llanverras; because the intent of the Legislature was, that the pauper should be of ability to stock and hold a tenement of 10*l.* *per annum*; and, if this devise be permitted, a man may rent a tenement of 12*l.* *per annum*; and, by reserving the value of one shilling to himself, and his lessees doing the same in succession, give a settlement to forty people.

But *per Cur.* In case of a gross fraud, the Sessions would find it so, and the settlement would be void. But no fraud being found, upon the law of the case there is no doubt but that Hughes was the tenant and liable to the rent, and had credit for the whole, which is what the act meant to require. And therefore he is as much settled, as if he had rented a tenement of 10*l.* a year, and let lodgings.

Orders confirmed (r).

(r) This case was cited as authority by *Aston, J.*, in *R. v. Newnham*, Burr. Sett. Ca. 756; in which case it was decided, that if a man take a tenement of more than 10*l.* *per ann.*, he will gain a settlement, although he afterwards occupy it jointly with another person; *R. v. Hoos*, 4 East, 362, *acc.* But where a pauper rented and occupied a tenement of 8 guineas *per ann.* in B., and let his freehold estate in A. for 50*s.* *per ann.*, he did not gain a settlement; *R. v. South Bemfrest*, 1 M. & S. 154. There the tenement and freehold were in different parishes. Yet a pauper did not acquire a settlement by occupying his own freehold estate of 30*s.* *per ann.*, (purchased by him for 10*l.*) and other lands as tenant at 9*l.* 10*s.* *per ann.*, both in the same parish; *R. v. St. John, Glastonbury*, 1 B. & A. 481. And in order to gain a settlement by renting a tenement, he must have resided upon some part of it; *R. v. Bardwell*, 2 B. & C. 161. But now, by 59 G. 3, c. 50, it is enacted, that after July 2d, 1819, no person shall acquire a settlement by renting a tenement, unless such tenement shall com-

ast of a house or building within such parish, being a separate and distinct dwelling-house or building, or of land within such parish, or of both, *bond fide* hired at and for the sum of 10*l.* a year at the least for the term of one whole year; nor unless such house or building shall be held and such land occupied and the rent for the same actually paid for one whole year by the person hiring; nor unless the whole of such land shall be situate within the same parish as the house wherein the person hiring shall dwell. See *R. v. St. Mary-le-bone*, 4 B. & A. 681. If a pauper (since 59 G. 3,) hire a house from one person and a garden from another at different times, and underlet one of the rooms, still he will gain a settlement under this act, having held them together and paid rent for them for one whole year: for he continued tenant of the whole house, notwithstanding the underletting; *R. v. North Collingham*, 1 B. & C. 578; 2 D. & R. 743. By 6 Geo. 4, c. 57, s. 2, it is now necessary to prove the actual value of the tenement.

MICH. TERM,—7 GEO. III. 1766.—K. B.

ROE on the demise of NODEN *v.* GRIFFITHS.

S. C. 4 Burr. 1952.

IN ejectment, the case was; In 1724, a copyhold estate was surrendered to the uses of a marriage settlement, which left in the surrenderor the reversion in fee, and a power to devise the same by will. Afterwards a surrender was made by him to the use of his will, and a will made accordingly. In 1751, the surrenderor was called upon by the steward to be admitted to some of the particular estates, created by the original surrender in 1724, which was done. *Qu.* Whether this admittance operated as a revocation of the prior will?

Admittance to a copyhold grounded on a prior surrender no revocation of an intermediate will (a).

And by Lord MANSFIELD, C. J., and the Court.—Where circumstances have been determined to be revocations of wills upon subtle artificial reasons, and not upon the intent of the testator, those cases must be adhered to, when the same circumstances come again in question and not otherwise. There is no case, in which the present circumstances have been deemed a revocation; and as the testator's intention does not appear to have been to revoke his will but rather the contrary, being compelled to be admitted and not a volunteer, it is therefore no revocation. Besides, we may consider this whole transaction as one and the same; and then the admittance in 1751 will relate to the surrender in 1724, and be prior to the will. This was the principal ground which the Court went upon in *Selwin* and *Selwin* (b), M. 1 Geo. 3. Mr. Justice DENNISON thought it against the practice of the *Court, and therefore improper to give reasons when we certify into Chancery; otherwise, I was prepared to have shewn, with the concurrence of all my brethren, 1st. That in all contingent, springing and executory uses, where the person who is to take is certain, so that the same may be descendible, they are also devisable: they are convertible terms. But the great and manly ground upon which the Court went in that case was, 2. That the deed, recovery, and all the whole transaction was to be considered as one conveyance.

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Contingent uses if descendible are also devisable.

Deed to lead uses and recovery are all one conveyance.

(a) See *Thrustout v. Cunningham*, post, 1046.

(b) *Ante*, 222, 251, which see, and particularly n. (m), p. 254.

THE KING *v.* JUSTICES OF DERBYSHIRE.

S. C. 4 Burr. 1991.

MOTION for a *mandamus*, to register (c) a certain tenement, which was certified to the Quarter Sessions as a place set apart for the meeting of Protestant dissenters.

Sessions is merely ministerial, as to registering meeting houses under the Act of Toleration.

(c) Under 1 W. & M. c. 18, s. 19, the Toleration Act; see further regulations by 52 G. 3, c. 155.

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Morton and Blackstone shewed for cause, 1st. That the parties certifying have not shewn under what denomination of Protestant dissenters they fall, so as to entitle themselves to the indulgence shewn by the Toleration Act, which only meant (*vid.* § 17) to give ease to tender consciences, when professing such principles as neither endanger the civil government, nor undermine the fundamental doctrines of the Christian religion. These people may be Arians or Socinians. Suppose them only Methodists (*which was the fact*): As these do not dissent from the Church of England, but only pretend to observe her doctrine and discipline with greater purity than their neighbours, it may be a very serious question, how far they are the objects of the Toleration Act, and privileged to meet in conventicles. 2d. The parties applying are not of the neighbourhood, so as to be able to resort to it when recorded. *Queen and Peach*, Salk. 572(d), it was held, till 10 Ann. c. 2, that a dissenting minister, who had qualified in one county, could not officiate in another. More reasonable to require, that the persons certifying should be of the neighbourhood, who may *bond fide* use the meeting house when registered.—When registered, it acquires some privileges; as by 1 Geo. 1, c. 5, it is felony to begin to demolish it. May a person at any distance, and who is no dissenter, *certify *any* tenement to the Sessions, and thereby give it those privileges? 3d. The persons certifying do not appear to have complied with the terms of the Toleration Act by taking the oaths and making the declaration: *K. and Larwood*, Salk. 168, 4 Mod. 274, this required by the Court: And was complied with in *Green and Pope*, Lord Raym. 125.

But the Court was of opinion, that in registering and recording the certificate, the Justices were merely ministerial; and that after a meeting-house has been duly registered, still, if the persons resorting to it do not bring themselves within the Act of Toleration, such registering will not protect them from the penalties of the law.

Rule for *mandamus* absolute (e).

(d) 6 Mod. 228, 310, *S. C.* bridge, ante, 552; Bac. Abr. *Mandamus*
(e) As to granting *mandamus*, see *R. v.* (D).
Barker, ante, 300, 352; *R. v. Univ. Cam-*

GULLIVER on demise of CORRIE, *alias* WYKES, v. [Shuckburgh]
ASHBY.

S. C. 4 Barr. 1929.

Devise to the heir at law *in tail* with a proviso for taking the testator's name, is not a conditional limitation.

[Devise "to A. and the heirs male of his body,

EJECTMENT on the several demises of the same person, by the name, 1st. Of Ambrose Corrie; 2dly. Of Ambrose Wykes: Verdict for the plaintiff, subject to this special case.

William Wykes, on the 15th August, 1736, by his will, duly executed, gave and disposed of *his temporal estate (inter alia)* in manner following. "Whereas, for want of issue male by my " now wife, the lands, &c., settled on her in jointure are limited to me and my heirs; therefore, in case I should leave

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and the heirs]
male of their
bodies" gives A.
an estate-tail.]

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" no issue by my now wife, I give, devise and bequeath all my
" mansion-house, &c. and estate at Haslebeach, from and after
" my wife's interest therein, according to her settlement or this
" my will, unto my loving sister Dorcas Wykes, for and during
" her natural life; and from and after her decease, unto my
" nephew Ambrose Saunders, and the heirs male of his body
" lawfully begotten, and the heirs male of their bodies lawfully
" begotten; and for want of such issue, to the heirs male of
" the body of my sister Dorcas Wykes, and the heirs male of
" their bodies lawfully begotten; and for want of such issue,
" unto my wife and nephew's godson Ambrose Corrie, and the
" heirs male of his body lawfully begotten, and the heirs male
" of their bodies lawfully begotten; *remainder, to the heirs
" of the body of Ambrose Saunders, Dorcas Wykes, and Ro-
" bert Ekins successively; remainder, to my own right heirs
" for ever. PROVIDED always, and this devise is expressly
" upon this condition: that, *whenever* it shall happen, that the
" said mansion-house and estates, after my wife's decease, shall
" descend or come unto any of the persons herein before named;
" that the person or persons, to whom the same from time to
" time shall descend and come, that he or they do and shall
" *then change their surname*, and take upon them and their
" heirs the *surname of Wykes only, and not otherwise*. And
" I do declare further, that my several devises of my said
" estates at Haslebeach are on this express condition, likewise,
" that no person shall plough up or commit any waste on the
" premisses, &c. by felling trees (unless for necessary repairs)
" or otherwise; but shall forfeit the premisses and ground upon
" which the trees shall be so fallen, or on which such waste
" shall be committed, to the person who shall be next entitled
" to the premisses, according to this my will." And then fol-
" lows a devise of the places so wasted, to the person next in
" remainder, *toties quoties*. On 9th May, 1742, the testator died,
leaving his sister the said Dorcas Wykes, and his nephew the
said Ambrose Saunders; his heirs at law (*f*). Grace Wykes,
the testator's widow, died 16th January, 1747, upon which
Dorcas entered; and on her death, 26th December, 1756, Am-
brose Saunders entered, but never changed the surname of
Saunders, or took the name of Wykes. But by lease and re-
lease, 8th and 9th February, 1759, and a common recovery suf-
fered in pursuance thereof, he conveyed the said premisses to
the use of himself in fee, and died 8th October, 1765; and the
defendant Ashby entered thereon (as his heir at law). On 17th
January, 1766, the lessor of the plaintiff made an actual entry
on parcel of the premisses for a breach of the proviso, by
Saunders not changing his surname and taking the name of
Wykes.—*Qu.* 1. Whether Ambrose Saunders had an estate
for life, or in tail? 2. Whether, by his not complying with the
proviso for changing his name, the estate was not out of him

(*f*) As co-parceners, Ambrose being the son of the testator's sister Sarah Wykes,
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be*fore he suffered the recovery; and consequently, the remainder to the lessor of the plaintiff shall take place?

This case was argued by *Glynn*, Serjeant, for the plaintiff; and *Leigh*, Serjeant, for the defendant, in Trinity Term last; and by *Hill* for the plaintiff, and *Blackstone* for the defendant, in the present Term.

Upon the 1st Question, it was argued for the plaintiff, that, where an estate is limited by will to an heir-male and the heirs of his body, the first word *heir* is only descriptive of the person to take; for it would be idle to add words of inheritance afterwards, if the first words were intended to give an estate of inheritance to the first taker; *Archer's Case*, 1 Rep. 66(g). So too in *Legate* and *Sewell*, 1 P. Wms. 87, *Tracey, J.*, was clear, that such a devise as the present carried only an estate for life: and though the three other Judges certified it to be an estate tail, yet, Lord *Cowper* was so dissatisfied with their opinion, that the case was never determined. *Heirs* are not necessarily words of inheritance in a will, when the intent is plainly otherwise; *T. Jones*, 114(h); *Low* and *Davis*, Lord Raym. 1561. And it is evident the testator intended only an estate for life, by annexing to it the condition to restrain waste, which would be nugatory, if he had meant an estate tail.

But by Lord MANSFIELD, and the Court. It is too clear a point to be argued at all for the defendant(i). In *Archer's* and other Cases there was a previous estate for life given by the will; and here is none to Ambrose Saunders, though the testator has given others an estate for life by the same will. *Legate's Case* had also an estate for life expressly given, and yet that was decreed to be an estate tail, notwithstanding the printed book says otherwise(k).

[*610] Upon the 2d question it was argued for the plaintiff, that if the taking the name be not a condition precedent, yet it is a conditional limitation, the breach of which divests the estate; and not a condition subsequent, of which none can take advantage * but the heir at law. Where to construe words to be a condition would defeat the intent of the testator, they shall make a conditional limitation; *Scholastica's Case*, Plowd. (l) &c. (But *per Cur'*. There is no need to cite cases to prove that words of condition may sometimes enure as conditional limitations, especially where the heir at law is the first taker.) To apply then more closely to the present case; wherever a proviso or collateral limitation is annexed to an estate in fee-simple, there the benefit of the condition will go to the heir, unless there be a devise over on breach of the condition: But where such condition is annexed to a particular estate, with a remainder expectant, there it shall always be a conditional limitation; and there needs no devise over in case of a breach, but the remainder-man shall take advantage of the breach without

(g) But see the observations upon that case, *post*, 1012, n.
(h) *Lisle v. Gray*.
(i) See *Long v. Lamy*, *ante*, 265, and

cases there referred to.
(k) 2 Ves. S. 657, *acc*.
(l) P. 408.

it; *Andrews and Fulham*, Stra. 1092, Viner, *Devise*, L. 53 (m). If the estate be defeated by such a breach, the remainder vests instantly, without any chasm; 2 Rep. 51 a; 2 Bulstr. 125, *Roberts and Roberts*; 3 Lev. 437, *Duncombe and Duncombe*, Perk. sect. 567; Bro. *Devise*, 4. If a devisee in tail *refuses* the estate or *dies without* issue, the next in remainder takes place immediately. So too if the estate tail be *originally void* in its creation; *Goodright and Cornish*, Lord Raym. 3, Salk. 226. The same law should take place, if the estate *be afterwards determined* by breach of the annexed condition; Hob. 346, *Sheffield and Ratcliffe*; Moor, 212, *Rudhall and Milward*. It remains therefore only to shew, that the proviso in the present case operates by way of limitation; and then it will follow that Corrie's estate vested in possession on the breach of it. The proviso could not be intended to affect Dorcas, whose name was Wykes already. The first, to whom it could relate, was Saunders; and the words "*and not otherwise*," imply a revocation of the devise, if the name was not changed. In *Wellock and Hammond*, Cro. Eliz. 204, 2 Leon. 114; devise to the heir at common law of lands in *Borough English* on condition, without any devise over; held, to be a limitation: *Curtis and Wolverstone*, Cro. Jac. 56, S. P.; Dyer, 316 b, (referred to, in 3 Rep. 21). Same point in a Gavelkind Case, *dubitatur*; now cleared by *Wellock and Hammond*. It may be objected, that Saunders was not the heir, because he and Dorcas Wykes were parceners, and so these cases don't apply: to this *it is answered, 1. That the heir of Dorcas could only have entered for a moiety, and the estate was meant to pass entire. 2. When Saunders came to the estate, and ought to have performed the condition, he was sole heir. 3. Wherever the heir enters for a forfeiture, he takes by descent; 1 Rep. 99; Jenk. 249. But *one* parcener cannot take by descent; Salk. 242: therefore one parcener cannot enter for a forfeiture. Lastly, The intent of the testator is clear, that the name and estate should not be separated; and upon this proviso no one can enforce that intent but by making it a conditional limitation. It is a kind of necessary implication, when all the words of the will *will not* be satisfied without this construction, and all *will* be satisfied with it. There is no hardship in barring the issue of Saunders by his default, since he might have barred them many other ways. As to the devise over, inserted in case of waste, but which is omitted here, the intent in both provisos is not the same. In our case he meant the *whole* estate should go over; in that, only the *place* wasted: and therefore he expresses it there. As to the time when this forfeiture accrued; we say, as soon as the estate came to him, or within a reasonable time afterwards. Certainly there was reasonable time between the death of Dorcas, in 1756, and the recovery in 1759.

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(*) *J. C. Andr.* 263; cited also in *Gulliver v. Wickett*, 1 Wils. 105, (which see) and in *Avelyn v. Ward*, 1 Ves. 8. 421.

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For the defendant it was insisted, that this was a condition *subsequent*, which cannot be taken advantage of by a stranger, but only by the heir, which is barrable by recovery, 1 Mod. 111 (n); and therefore barred in the present case. The words are clearly words of condition, and cannot be implied into a limitation, unless to effectuate the manifest intent of the testator. Only two ways are hitherto known of implying a limitation by collecting that intent. 1st, Where there is a devise over in case of breach of condition; *Porter and Fry*, 1 Ventr. 199 (o); *Page and Hayward*, Pigott, 176, Salk. 570; *Rundale and Ealey*, Cart. 171 (p): in which case the law unites the condition to the remainder over, and does not suffer it to descend to the heir. 2d, Where an estate on condition is devised to the heir at law; *Wellock and Hammond* (q). The present case falls within neither of these descriptions. 1st, There is no devise over in case the condition be broken. And yet, in the very next clause, he devises over in case of a breach of

*the condition of not committing waste: plainly apprehending, that the mere breach of the condition would not occasion it to go to the remainder-man; for then the *whole* estate would pass to him by operation of law, and his express meaning is, that only the *place wasted* should pass. By the breach of a proviso (whether it be a condition or limitation) the whole estate must be defeated, and not a part of it; by *Anderson, C. J.*, cited 1 Rep. 85 b. Nor, secondly, Was the estate in this case devised to the heir; Saunders was only part of an heir, a coparcener with Dorcas Wykes. He became sole heir long after the testator's death, by the decease of Dorcas without issue. If it was a limitation at all, it was so at the death of the testator; and then the reason for implying it to be so did not exist. The coparcener might have entered and defeated the whole estate, and have enjoyed a moiety; which perhaps the testator might think to be forfeiture sufficient. And, though a parcer cannot take her own moiety by descent, and her sister's by devise, when the whole land is devised to her by the ancestor, yet, if two parcerers be deforced, each shall enter for her own moiety; Lutw. 802; Bro. *Co-parceners*, 2. So one coheir in gavelkind may enter (for a forfeiture) on a moiety, Dyer, 317 (r); resolved, in the case of *Wellock and Hammond*. It would be an harsh construction to suppose, that by the fault of the first taker the issue in tail should be inevitably barred. For, if it be a limitation, the estate instantly determines, *Bracebridge's Case* (s), Moor, 99, 633; and the forfeiture is not optional, as in case of a mere condition. Besides, in case of an estate tail, the law will raise no implication to prejudice the innocent issue in tail, who is the first object of the testator's bounty, in favour

(n) *Hudson v. Benson*; S. C. 2 Lev. 28; S. P. *Driver v. Edgar*, 1 Cowp. 379: see 2 Atk. 591.

(o) Or Lady *Anne Fry's Ca.*

(p) Denied to be law in 11 East, 666.

(q) *Ubi supra*: accord. *Wiseman v.*

Baldwin, 1 Roll. Abr. 411, pl. 5; *Anon.* 2 Mod. 7.

(r) It should be, Dyer, 316 b, pl. 5, *Anon.*

(s) Or, *Harwell v. Lucas*.

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of a remainder-man, who is only a secondary object. All the cases are of estates in fee. The only surmise of an implied limitation after a conditional estate tail is the confused note of *Rudhall* and *Milward*, Moor, 212, more clearly reported in Savil, 76; and there held to be no limitation, but a condition (d). S. P. held in *Skirne* and *Bond*, 1 Roll. Abr. 412, and *Thomas's Case*, Ibid. 411, 483.

* But, supposing it a limitation, we then insist, 1. That there was no breach before the recovery. 2. That the lessor of the plaintiff has not made out any title. 1. When no time is limited for fulfilling a condition, then if it be beneficial to any body, the performance may be hastened by request. But, where (as in the present case) it is beneficial to nobody, and depends on the sole act of the person bound to perform it, he has all his life to perform it in; 6 Rep. 30 b; 4 Leon. 125 (v). Either Saunders had therefore his whole life to perform it in, or it must be argued that he was bound to take the name the instant the estate vested: for if it is deferred, under the idea of giving a reasonable or convenient time, it still remains indefinite during his life. If notice is allowed to be requisite (both of the devise and the condition) how does that notice appear to be given? Saunders's most beneficial and *prima facie* title was as heir at law. If it is objected, "This will render the testator's intention of no effect;" it is answered, "No matter: if the testator's design is to have such foolish intentions executed, he should take care to guard them better." If therefore Saunders had his whole life to perform the condition in, he had a good estate tail when he suffered the recovery; and of consequence barred, not only the estate tail, but also the condition; 1 Mod. 111 (u); *Page* and *Hayward* (a stronger case) (w). 2. If the condition ought to have been performed immediately, or soon after the estate vested, still the lessor of the plaintiff must (upon that very ground) have no title at all. For it is agreed, that when the proviso is broken in a conditional limitation, the preceding estate ceases, and the subsequent estate vests, without claim or entry; *Bracebridge's Case*, Moor, 99, 633; *Rundale* and *Ealey*, Cart. 171; Co. Litt. 214 b; 10 Rep. 40 b (x); *Porter* and *Fry*, 1 Vent. 203; 2 Mod. 7, *Anon.*; *Foy* and *Hyrde*, Sir W. Jones, 58. If therefore Saunders's estate determined at any given period before the recovery in 1759, by not assuming the name, Corrie's immediately vested; and as he did not then assume the name, at the like given period, his estate also became forfeited; and so on, till Saunders's own reversion in fee as right heir of the testator took place. If a claim and entry were necessary to divest * the estate, none were made; and the recovery therefore was good. If none were necessary, the consequence will be as above stated. Nay, to this very day, the lessor of the plain-

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(d) See Mr. Fearne's observations upon that case in F. C. R. 259, (8th ed.).

(v) This reference should be to 1 Leon. 305, Ca. 425, *Fabian's Ca.*

(u) *Benson v. Hudson*.

(w) *Figott*, 176, Salk. 570.

(x) *Mary Portington's Ca.*

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tiff has not fully performed the condition, by using the name of Wykes *only*, for one of the demises is in the name of Corrie.

Lord MANSFIELD, C. J.—The only foundation of the plaintiff's title is, that Saunders's estate tail ceased by his not taking the name of Wykes, and vested in possession upon Corrie. It is merely a question of construction. And certainly the intent of the testator ought always to be carried into execution liberally, provided it be not contrary to law. It is pity, that in the old cases this principle is not carried throughout. They stop short in the middle, and determine partly on the intent, and partly upon technical reasons. Thus in *Wellock* and *Hammond*, the general principle is undeniably true, that where an estate in fee of the nature of *Borough English* is given to the heir at law upon condition, it shall be a limitation, to effectuate the intent of the testator. But the case then goes on directly contrary to the intent, which was to give it to the heir, *subject* to such a charge. The proviso was, "to pay in two years;" he paid it in five; and that was held a breach sufficient to divest his estate. In the present case it is admitted, that this proviso is not a condition precedent. It was impossible it should be so. The condition is not only to take the name for himself, but also for his heirs. This cannot be done, without a grant from the King, or an act of Parliament, neither of which are in the party's own power (*y*).

(*y*) *Quare* as to the necessity of having either the King's grant or an act of Parliament to enable a person to assume any particular surname; for a man may have several surnames; "may have divers names at divers times, but not divers Christian names;" Co. Lit. 3 a; *Disply v. Sprat*, Crok. Eliz. 57; *Fermor v. Dorrington*, Id. 222. From which it may be concluded, that a man may acquire a surname by reputation: for in the case of his having several surnames, he might have derived one from his ancestors,—"*Cognomen majorum est ex sanguine tractum*;" 6 Rep. 65 a,—and another from some accidental circumstance, or by his own assumption. Acquiring a name by reputation must be understood to mean a man's being generally called, known, described, and designated by any particular name in the *vicinitus*, which reputation or general designation has been the origin of all surnames. For they were originally descriptive of the character or person, of the rank, trade, or profession, of the residence or lands; or were patronymics. And though a bastard, being *filius nullius*, has no name (that is, no surname) by reputation as soon as he is born, he may afterwards acquire one, and a grant to such bastard will not be good till he has acquired one, that is, till he has either acquired the reputation of being the son of A.; and then it may be to him by the de-

scription of the "reputed son of A.;" or till he has acquired some surname, by which he is generally known; Co. Lit. 3 b; *Blodwell v. Edwards*, Crok. Eliz. 509; *Metham v. Duke of Devon*, 1 P. Wms. 529: and such name he may acquire without grant or act of Parliament. So it seems, that at this day a man may take upon himself a surname by styling himself and causing himself to be known and called by it, till it is given and assigned to him by general reputation; S. P. *per* Sir J. Jekyll, in *Barlow v. Bateman*, 3 P. Wms. 65. A man indeed cannot grant to another his surname and arms, without the King's grant; 4 Inst. 126: but a proviso, that a man shall assume a particular name and arms is not a grant, but merely a condition, on non-compliance with which he is to lose the benefit of the gift or devise to him. The King's license is merely a permission to use a particular name; *Leigh v. Leigh*, 15 Ves. 100. As to arms or armorial bearings, at this day they are granted by the Earl Marshal. A petition is presented to him, application having first been made to the Herald's College; and he thereupon grants the arms, which are limited, with his concurrence, in such manner, as the party applying for them desires. So he grants an addition or alteration to existing arms. As to the descent of arms, see Co. Lit. 27 a, 140 b. The cognizance of coats of arms belongs to the Court of

Next, it is observable, that these words are expressly penned as a condition subsequent, and not as a limitation; and yet the next clause of the will shews, that the testator knew how to limit. If this condition be turned into a limitation, it must be by implying something that is not expressed. In answer to this it is said, that no such implication has ever been raised upon a conditional estate tail. Two cases in point have *been cited by Mr. *Blackstone* to the contrary. And they go upon a very solid ground. A condition, when annexed to an estate in fee, is meant to be compulsory; but when annexed to an estate tail cannot be so meant, but merely as an intimation of his wishes; because the donee may bar the estate tail when he pleases, and the condition perishes with it. Thus it stands upon general reasoning. But, upon the words of this will it is clear, he did not mean the estate should entirely cease upon breach of the condition. It is imposed personally on those to whom the estate should successively descend and come, not on the root of their several descents, and is therefore binding only personally. This is also the testator's meaning in the clause respecting waste. He does not make the estate tail cease, but gives it to the next taker. Such a limitation is indeed void in point of law, according to *Jermyn* and

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Chivalry, also called the Court of Honour, as to which see 4 Inst. 123; *R. v. Parker*, 1 Sid. 352. And the offence of assuming or quartering arms, to which a person has strictly no right, is cognizable only in that Court, which is now obsolete: so that it seems any arms may be assumed or quartered with impunity. Except, that perhaps upon a title of dignity being granted, it may be necessary that the grantee should be able to prove his arms at the Herald's College, or else should have arms granted to him in the regular form.

Nevertheless it is usual to adopt the following expression in the clause for taking the arms and surname:—"Provided, &c. that all and every the persons and person, who by virtue of the limitations hereinbefore contained, or of this proviso, shall become entitled to the possession of the rents and profits of the manors and other hereditaments hereby limited in strict settlement, or expressed or intended so to be, and who shall not be then called by the name or use the arms of A., shall and do within the space of one year next after they shall respectively become entitled to the possession or to the rents and profits thereof; and that C. D., the husband of the said E. F., shall and do within one year next after the said E. F. shall so become entitled as aforesaid; and that all and every the person or persons whom the said E. F., after the decease of the said C. D., shall or may marry, or whom the said G. H. or any of the daughters or issue female of the said, &c. respectively shall marry, shall and do, if the said E. F., G.

H., or the daughters or issue female of the said, &c. respectively shall at the time of such her or their marriage or respective marriages be so entitled as aforesaid, then within one year next after the solemnisation of such marriages respectively; and if the said E. F., G. H., or the daughters or issue female of, &c. shall not be entitled at the time of such her or their marriage or respective marriages, but shall afterwards during her or their coverture or respective covertures become so entitled as aforesaid, then within the space of one year next after she or they shall severally become so entitled as aforesaid, TAKE upon himself, herself, or themselves respectively, and use in all deeds and writings whereto or wherein he, she, or they shall or may be a party or parties, and upon all other occasions, the SURNAME of A. together with his, her, or their own family surname; (but so, nevertheless, that he, she, or they shall be commonly styled and designated by the surname of A.); and also shall and do quarter the ARMS of A. with his, her, or their own family arms; and shall and do within the space of one year next after he, she, or they shall so become entitled as aforesaid, or after the solemnisation of their said several respective marriages, (as the case may be), apply for and endeavour to obtain an act of Parliament, or proper licence from the Crown, or take such other means as may be required or proper to enable and authorize him, her, or them to take, use, and bear the said surname and arms of A."

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heir can take
advantage of a
condition for
taking a name,
and at what
time?

Arscot (s), yet this construction is certainly most agreeable to the testator's intent. It is not necessary to consider how far the heir could have taken advantage of such a condition as the present: that may be doubtful. But the plaintiff can only claim upon the conditional limitation.

Two other points have been made in the case, not necessary to be now determined, if this be a condition subsequent, and not a limitation:—1st, Whether the party had all his life-time to perform this condition in? As to which I give no opinion. 2d, Whether, supposing it a limitation, the plaintiff could now take; because the estate, by his former laches, is gone over. To this I also give no opinion at present. If it had been necessary, perhaps one strict construction might have been set up against another.

YATES, J.—I am most clearly of opinion, that this is not a conditional limitation. It is not express, nor can it be implied, because it is not necessary to effectuate the testator's intent. No interest of any third person would be defeated *by the breach of this condition: there is nothing, therefore, to induce the Court to raise an implication to support a vain, an idle, a useless intention. The case in *Moor* went entirely upon the construction of the statute of uses, which had nothing to do with the distinction between a condition and a limitation. There never was, and never will be, such a limitation implied in case of an estate tail; because the Court always means to support the intent of a testator; but such an implication would defeat it, by stripping the issue in tail. The Court will never make so hard a construction. I don't consider this

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(a) Cited in *Corbet's Ca.*, 1 Rep. 85 a; from which cases, and others collected in *Fearne*, C. R. 252 (8th ed.), it appears, that a proviso to cease an estate tail "as if tenant in tail were dead," is repugnant and void; because the estate tail would determine not upon the death of the tenant in tail, but upon his death *without issue* (supposing him to be the first taker). Therefore it is absurd to say, that the estate should cease as if tenant in tail were dead, his death not being positively a determination of the estate. Mr. Butler, in n. (e), *ibid.* observes, that the expression, that the estate of tenant in tail shall cease "as if he were dead without issue," is not sufficiently accurate. For though in the case of A., the first tenant in tail, dying without issue, the estate tail would determine; yet if A. had two sons, B. and C., when B. is in possession, his dying without issue will not have the same effect: for in that case the estate tail will be continued in his brother C. and his issue. And as it is requisite that the proviso should be such as to determine the estate tail entirely (for it cannot be determined in part and be left existing in part), the expression, to meet every possible case, should be to the following effect—"as if the party be-

coming entitled were dead without issue, and there were a general failure of issue inheritable under the limitation to A. and the heirs of his body." Otherwise the proviso would be repugnant and void, inasmuch as B.'s being considered dead without issue, living C. or C.'s issue, would only determine the estate tail in part.

Where an estate is limited in strict settlement, this part of the proviso may be in the following terms—"And all the said manors, &c. shall go to the person next in remainder, under the limitations herein before contained, in the same manner, as if such person or persons so neglecting or refusing, or whose husband or husbands shall so neglect or refuse, being a tenant or tenants for life, were dead, or being a tenant or tenants in tail male or in tail, were dead, *without leaving any heir inheritable* to the estate tail or estates tail then vested in the person or persons so neglecting, &c. or whose husband, &c." or "without leaving issue inheritable under such entail." See also another form and Mr. Butler's very valuable observations in *Harg. Co. Litt.* 327 a [n. 283].—See, as to the condition of taking the surname, *Doe v. Lord W. Beauchamp*, 11 East, 657.

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even as a condition, but as a mere recommendation only. As a condition it would be nugatory; for the party might write his name once or twice, then suffer a recovery, and bar the whole. The clause respecting waste shews the testator knew how to limit over.

ASTON, J.—I give no opinion, whether this is a condition or a recommendation; it is clearly not to be implied a limitation, being not grounded on the intent of the testator. But the interpretation prayed is clearly against his intent, and never given upon an estate in tail. The report in Savil is the best and true report of *Rudhall* and *Milward*. The next clause shews, that, on breach of the proviso, the estate was meant to go to the issue in tail, and not to the remainder-man, though the case of *Jermyn* and *Arscot* makes such a condition void. As to the time of the performance, and the other point, I give no opinion, but only think, that a rigid construction should be put upon such odious conditions.

HEWIT, J.—There are two cases in which words of condition always operate as a limitation:—1st, Where there is a devise over in case of non-performance: 2d, Where the heir-at-law is the devisee. The intent of the testator was, not that the issue should be barred by the breach of the first taker: he never meant that their estate should depend upon his: he did not mean to create an estate tail in the first taker, but has so expressed himself that it must be so by the rules of law. Here is certainly no devise over, and I am not satisfied, in this case, that Saunders is to be considered as the heir-at-law. But if he was, as this is an estate *tail, *Thomas's Case* is a case direct in point. It is unnecessary to give any opinion on the other points.

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Postea to the defendant (a).

(a) "It seems now agreed, that wherever, in a devise, a condition is annexed to a preceding estate, and upon the breach or non-performance, the estate is devised over to another, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that upon the breach or performance of it (as the case may be), the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate.—And limitations of this sort are properly called condi-

tional limitations."—"But where there is no express limitation over, to take effect upon the breach or performance of the condition annexed to a preceding estate, there it seems the condition or proviso is not always construed as a conditional limitation; but the construction in that case is governed by the apparent intent of the testator, as in the case of *Gulliver v. Ashby*;" *Fearne*, C. R. 272 (8th ed.); see also the same work, pp. 425, 526; *Doe v. Lord W. Beaucherk*, 11 East, 657. As to a condition in a bequest of personalty, see *Scott v. Tyler*, 2 Bro. C. C. 431, and Mr. Eden's note, *ibid.* 489.

WILSON v. SEWELL, Master of the Rolls.

S. C. 4 Burr. 1975.

ACTION on two feigned issues, to try whether two leases granted by Sir Thomas Clarke, late Master of the Rolls, the one dated 9th June, 1755, the other 5th January, 1762, of certain premisses in Chancery Lane, belonging to the office of

The Master of the Rolls may grant as many concurrent leases as he

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pleases during
the last seven
years of a former
lease. And,
it seems, may at
any time take a
surrender, and
renew for 21
years.

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Master of the Rolls, or either of them, were, on 5th January, 1765, good, valid, and subsisting leases for the residue of the terms comprised therein. On a special verdict it was found, that in 12 Car. 2 (b), an act of Parliament was made, "reciting, that, as former Masters of the Rolls had no power to grant leases for such terms as might encourage tenants to build and to repair, the estate was much out of repair; therefore the Masters of the Rolls for the time being were empowered to grant leases for forty-one years, to commence from the making, reserving 20s. rent at least for every parcel of ground on which any new house shall be built, and the usual rent where there is no provision for new building. *Provided that, after the premisses have been once letten, according to the power aforesaid, the Master of the Rolls shall not grant or make any new or concurrent lease, until within seven years of the expiration of the lease then in being: nor for any less rent than upon the former lease; nor for any longer term than twenty-one years.*"—That 9th October, 1738, Mr. Verney was made Master of the Rolls; and, 8th March, 1740, demised the premisses to Robert Harley and Charles Frewen for twenty-one years from the making, at 3*l.* rent.—That 29th May, 1754, Sir Thomas Clarke was made Master of the Rolls; and, on 9th June, 1755, granted a concurrent lease (c) of the premisses to Charles Deaves and John Harrison for twenty-one years from the making. *Afterwards, on 5th January, 1762, Sir Thomas Clarke granted another lease of the premisses to Samuel Seddon and Charles Deaves (who had survived said John Harrison), reciting the lease of 8th March, 1740, and that the same was within less than seven years of expiring, for twenty-one years from the making. That Charles Deaves, by indenture, bearing date 4th January, 1762, did surrender to Sir Thomas Clarke nine leases, dated 29th August, 1754, and thirty other leases, dated 9 June, 1755 (including the lease in question), all which were granted in trust for Sir Thomas Clarke, who had directed the same to be surrendered, and all his interest under the said leases or otherwise howsoever, to enable him to grant new leases: but that the said surrender (though dated 4th January, 1762), was not in fact executed till 5th June, 1764. That Sir Thomas Sewell, the defendant, was made Master of the Rolls on 4th December, 1764.

This case was argued in last Michaelmas Term (1765), by *Ashhurst*, for Sir Thomas Sewell (the lessor of the plaintiff, it being then in the shape of an ejectment), and *Dunning*, for Wilson, the then defendant.

Ashhurst argued, that the surrender by Deaves must take effect from the delivery, *viz.* 5th June, 1764; Perk. sect. 145; Salk. 76 (d). Therefore [it] operates as a surrender of the leases of 1755, and of Deaves's moiety of the leases in 1762, the

(b) C. 36.

(c) As to concurrent leases, see Bac. Abr. Leases, (E), pa. 64, and Sugden on

Powers, 595 (3d ed.).

(d) *Styles v. Wardle*, 4 B. & C. 998; S. C. 7 D. & B. 507.

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words of surrender being general. If so, Sir. T. Clarke became thereby tenant in common with Seddon; and the successor may bring his ejectment; Cro. El. 737, 802; Co. Litt. 199 b. And with regard to the question at large, first consider the intent of the Legislature. Concurrent leases were allowed at the end of fourteen years, and not sooner, to encourage repairs, and for the benefit of the successor at the same time, that every Master may have a fair chance of renewal. Sir Thomas Clarke thought it necessary to have a surrender, before he granted a new lease, which followed the other so closely.—*2dly, Next consider, whether the power is well executed. The lease of 1755, though good when made, is now out of the case, being surrendered and gone. That of 1762 is void, because,—1st, The power of leasing, being once executed, is determined *pro hac vice*, till the period comes round to make it again exerciseable; Eq. Cas. Abr. 342; Freem. 61 (e); like the case of a power to make a jointure.—2dly, It is contrary to the words of the act. The lease of 1755 was in being when that of 1762 was made, and not within seven years of expiring.—3dly, It is contrary to the spirit and intent of the power, and fraudulent. Fraud, particularly in the case of powers, is cognizable in a Court of law; *Lane and Page*, T. 27 Geo. 2, B. R. (f). A power given for one purpose, shall not be exercised for another, though within the letter of the power; *Allan and Belcher*, Trin. Vac. 31 Geo. 2 (g). In Chancery a power must be executed according to the intent of granting it. A grant, by a Master of the Rolls to his own trustee, is a fraud upon the power, and was never intended by the Legislature. This is an instance of the fatal consequence; stronger than *Lane and Page*: It is not only a constructive, but an actual fraud. The lease in 1762 takes no notice of that in 1755, as if it meant a suppression at first. Afterwards, on recollection, a surrender is made, but antedated.

Dunning, for the then defendant, argued, that, if the leases of 1755 and 1762 were co-existent, there would be great difficulty; but they never were so. The acceptance of the new lease merged and surrendered the former. This was not *in being* the instant the new one was signed and accepted. It is the more forcible mode of surrender. He cannot be supposed, by the words "*or otherwise*" in the actual deed of surrender, to intend to part with any interest but those under *the leases there recited. The jury have not found such an intent. The Court will not construe the words to make them operate against the party's meaning, which was clearly to effectuate, not destroy, the lease of 1762. I admit, that if the lease of 1762 had not been to Deaves, who had in him the interest of 1755, it would have been bad without a previous surrender. And a subsequent surrender could not have been made to Sir T. Clarke, for that must be to the immediate remainder-man, and

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(e) *Hatcher v. Curtis*; S. C. 2 Eq. Cas. 406 (3d, ed.).

Abr. 671.

(g) 1 Eden, 132; see Sugd. *ubi sup.*

(f) Ambl. 233; see Sugd. on Powers, and *Daubeny v. Cockburn*, 1 Mer. 637.

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not to the original lessor. In *Lane's* and *Belcher's* Cases it was allowed, that if a power be substantially executed, it is sufficient. As to the charge of fraud; 1st, *Constructive*.—Which is not usually the object of this Court. And in Chancery, nothing more usual than to establish such leases granted by bishops and other tenants for life, for their own and their family's use. 2dly, *Actual*.—The Master of the Rolls could never mean that both leases should subsist together, but that of 1755 should be extinct. As to the antedating, both were prepared at the same time, but one by accident overlooked.

Lord MANSFIELD, C. J.—If the lease being in trust for the Master of the Rolls makes it fraudulent, both that in 55 and in 62 are bad. How was the original cotemporary exposition of this law? Mr. Verney's, I know, were in trust. I remember, on the death of Sir J. Jekyll, a dispute arose between his representatives and Mr. Verney. The act says, they shall make no new or concurrent lease, &c. Sir J. Jekyll, construed or to be *and*, and made new leases (not being concurrent) for forty-one years: Verney litigated the point, and what was the result? Did not Mr. Verney reduce these illegal leases to what might have been legally granted, as is the rule in the Court of Chancery? Another point is, Whether the surrender of the lease in 1755, merely to effectuate that in 1762, shall operate to destroy the first lease, if the second lease is bad in itself, and therefore not capable of being effectuated? Is this meant to be seriously supported? But, 3dly, Whether the lease in 1762 is not bad, after the lease of 1755, as being too soon, is the material point to be considered on another argument.

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In this present Michaelmas Term, *Norton*, for the defendant Sir Thomas Sewell, argued—This is not a power arising out of the dominion of the former owner, nor founded on any meritorious consideration, but merely to make the Master of the Rolls live after his death for a limited time. Such powers are odious in law, and are considered as *stricti*, nay *strictissimi juris*. I shall first consider the lease of 1762, which I contend to be (not void as against the grantor, but) voidable as against the successor; because, 1st, Made, while the lease of 1755 was in being, which had more than seven years to run. 2d, The Legislature considers *new* and *concurrent* leases to be different; and orders, that neither shall be made till within seven years of the expiration of the former lease. 3d, Otherwise surrenders might be made every year, and the office be left covered with leases. No Master of the Rolls, till Sir Thomas Clarke, has thought proper to act the part he has done; and cotemporary exposition is a strong argument. Sir J. Jekyll thought, that under the act he had a power to grant new building leases for forty-one years, if necessary, and did so. This question was disputed between his executors and Mr. Verney, and it was decided by the ablest authority (on a private reference), that the power once exercised could not arise again. Mr. Verney voluntarily and honourably confirmed the leases for

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twenty-one years. All persons then saw that these powers ought to be strictly construed, though Sir J. Jekyll was certainly within the original reason of the act. *It is objected, that the surrender of the lease in 1755 substantiates that in 1762, and being one transaction, though by different instruments, the Court will construe them as one conveyance to effectuate the intent of the parties. The answer to which is,—when the lease of 1762 was made, the intent was not to have surrendered, but to have suppressed that in 1755. Mr. Verney's lease is recited as the only subsisting lease: The surrender was an afterthought. No such intent therefore existed on which to ground such a construction. The lease of 1762 was therefore void at its granting, and cannot be made good by a surrender made two years afterwards and antedated. If a testator means a strict settlement, and uses words which give an estate tail, the Court will not do violence to the rules of law; *Colson and Colson* (h). Next I shall consider the lease of 1755. This was certainly good when made: But it does not now subsist; not only by the actual surrender, but by the acceptance of the new lease in 1762. Herein I shall not militate with the argument hinted at by the Court, that the surrender of 1764 shall not destroy the lease of 1755, if it does not substantiate that of 1762. For I allow, that it substantiated it as against Sir Thomas Clarke the grantor, but that it is voidable by the successor. And that by acceptance of a new voidable lease, an old good lease may be surrendered, extinguished, and gone, is the doctrine of all our books; *Dyer*, 140, pl. 43; *Moor*, 636; *Cro. El.* 874; 1 *Inst.* 218 b; *Aleyn*, 59; *Dyer*, 280, pl. 13, and especially, *Plowd.* 107 b (i).

Morton, for the plaintiff.—The intent of the act is to enable the Master of the Rolls to grant such leases as might induce tenants to rebuild or repair. *New or concurrent* are synonymous. Every new lease is concurrent, unless the old is totally expired. The lease of 1740 was the true substantial lease in being when that of 1762 was granted. After that had run fourteen years, the Master *of the Rolls might let leases every month. [*623] This is the legal and formal exposition of the act. The true intent of the act is, that the Master of the Rolls might at all times set up to sale the beneficial interest of the office for twenty-one years. He is empowered to bind his successors for that period, and this lease does no more. There is no prohibition, that the tenant shall not make nor the Master accept a surrender. If so, the Master might be prevented from benefiting his successor by accepting an absolute surrender. Where a devisee for life with power to lease for twenty-one years grants such lease, and at the end of twenty years grants for twenty-one from the making, it is good; 1 *Leon.* 147-8. Under the disabling statute 13 *Eliz.* (k) concurrent leases were good. Stat. 18 *Eliz.* (l) prohibited them, unless within three years of

(h) 2 *Stra.* 1125, 2 *Atk.* 246, *Fearnle*,
C. R. 161.

(i) See *Bac. Abr. Leases*, (S) 3, p. 212.

(k) C. 10.

(l) C. 11.

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the expiration, or on surrender of the old lease. New leases, at seven years' end on surrender of the old, is every day's practice. Thus, supposing Mr. Verney's lease to be in being, any other leases granted after the effluxion of fourteen years would be good, if not for longer than twenty-one years from the making. As to the inference drawn from the operation of the new lease of 1762, as a legal surrender of that in 1755; so as that the lease of 1755 is at all events determined, and yet shall be set up in the same moment to destroy the same lease of 1762: This is so harsh a construction, especially too coming from an equitable quarter, that to state it is a sufficient answer.

YATES, J.—As the ground of implied surrenders is the transfer of the possession back from the lessee to the lessor; *Qu.* whether that will hold in the present case, so as to make the acceptance of the lease in 1762 a surrender of that in 1755; since Mr. Verney's lease, which carried the possession, was still in being?

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Norton, in reply.—Where a person takes a subsequent interest that is not consistent with his former, that is a tacit resignation of the first: *more especially if by indenture, for that works an estoppel. And wherever an interest, either in possession or reversion, meets with a larger, as in the present case the term meets with the inheritance, it merges and drowns the less: And this principle holds equally, whether it be an estate in possession or expectancy. The custom of taking surrenders under the stat. 18 Eliz., in order for renewals, is the strongest argument that can be for our side of the question. The words of that statute are, that no concurrent lease shall be made, unless the lease *in being* (which does not signify the lease in *possession*, but any lease that any how subsists) shall be *expired, surrendered, or ended*, within three years. Had the same words been repeated in this statute, they would have given the same power. But it stops at the word *expired*, and purposely omits the other words. That this attempt was never made before is a strong presumption, that it is not according to the intent of the statute; and even a Court of equity would admit of a strict construction to set aside such an attempt.

LORD MANSFIELD, C. J.—There are two questions, 1st. On the subsistence of the lease of 1755: 2d. On that of 1762. 1st. I never had a doubt, but that if the lease of 1762 was bad, that in 1755 would be good. It is contrary to all principles of law and logic to suppose otherwise. The surrender is merely to effectuate the new lease. If the foundation fails, the implication ceases with it. As if a woman surrenders her jointure to make a tenant to the *præcipe*, and takes back an estate for life; if the recovery fails, she shall have her jointure again. When one surrenders a good lease, and takes a void one, it is determined in *Lloyd and Gregory*, Sir W. Jones, 405 (m), that the original lease remains. 2. But if the lease in 1762 was good, the whole question is at an end. And I think it is. It

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is objected, 1st. That letting it to trustees for the lessor is a fraud upon the power. That is a question merely *between the parties. It is just the same thing as betwixt the lessor and the successor(n). The practice of the office for 100 years accordingly is a sufficient justification. Next, as to the construction of the act of Parliament, I inclined for some time to think, that *new* meant a distinct thing from *concurrent*. That the Legislature, though it never meant to forbid all new leases, till after fourteen years from the making the old one, as in case of forfeitures, &c., yet meant to forbid *renewals* till fourteen years were expired. But on consideration I am fully satisfied, that this is not the true construction. In 12 Car. 2, a number of acts were subsisting, which gave leasing powers to tenants in tail, husbands and ecclesiastical bodies. The law of these was well known. Powers in marriage settlements to make leases were also very well known. In none of these powers, was there ever any restriction of renewals. Many advantages may result to the estate itself from the power of renewal. It is not therefore to be imagined that, if it had been meant to check the power of renewal in this instance, it would not have been done by express words. As to the estate itself, which consists of buildings wanting continual repairs, it had been imprudent and unwise, that the tenant should never prolong his term till fourteen years were expired: It would be ruin to the estate, and force the master often to rebuild, as Sir Joseph Jekyll did. Now, as to the words—*New* or *concurrent* are synonymous, and mean concurrent only. For what is a new lease with reference to a lease in being, but a concurrent one? The Legislature itself makes use of one word only (*new*) to signify both in the latter part of the same sentence. If an original lease may be surrendered, and a new or concurrent one granted, the concurrent one may likewise be surrendered and a new one granted. And therefore I think the lease in 1762 to be a subsisting one, and consequently that in 1755 to be gone.

YATES, J., of the same opinion.—*The cases cited, where both leases have failed, have in general been, where a man quits a prior good one and accepts a *defeasible* lease. But where the second is *void* for want of power in the lessor to grant, as would be the present case, if the lease of 1762 were bad; there the law is otherwise; Hutton, 104, *Watt* and *Maydwell*. But it is clear, that the lease of 1762 was a good surrender of that in 1755; because the lease in 1762 was a good one. My doubt concerning implied surrenders is warranted by law. A concurrent lease can only be surrendered by operation of law, and not by deed, Co. Litt. 338; because there is no reversion in which it may drown: So that the surrender of 1764 was useless. The lease *in being* is only that *in possession*: a concurrent lease is not a lease *in esse*. It operates only by estoppel: It passes no interest during the former lease. The stat. 18 Eliz. meant to restrain leases in reversion; therefore,

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by lease *in being*, the Legislature meant a lease in possession. The present statute meant, that the Master of the Rolls might at any time fill up twenty-one years, so as there was a lease in being that had run out fourteen years. By the lease of 1762 the office is not incumbered with more than a twenty-one years lease. After fourteen years were expired he has full power to grant any concurrent leases. The view of the Legislature was to protect the office from too long a concurrence of leases. 1 Leon. 148(o); tenants in tail may make leases for twenty years from Michaelmas next, though the stat. 32 Hen. 8, says, twenty-one years from the making; because it does not exceed the time. S. P. as to Bishops' leases, under 1 Eliz., Moor, 107; 1 Lev. 147.

[*627] ASTON, J., of same opinion.—The acceptance of the lease in 1762 was a good surrender of that in 1755, under a tacit condition that the lease in 1762 was a good one. * During the last seven years of Mr. Verney's lease, the Master of the Rolls had a power to grant as many leases as he pleased, and as often.

HEWITT, J., of same opinion.

Judgment for plaintiff, on the lease of 1762; for the defendant, on the lease of 1755 (p).

(o) *S. P. Dyer*, 246 a; *Bac. Abr. Leases*, (D) pa. 33.

(p) *Davison v. Stanley*, 4 Burr. 2210, accord.; see *Roe v. Archbishop of York*,

6 East, 86, where all the cases are referred to; also *Roe v. Pridemore*, 10 East, 183; 7 *Bac. Abr. Leases*, (A) Appendix.

HILARY TERM,—7 GEO. III. 1767.—K. B.

BEING indisposed the whole Term I did not attend the Court.

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EASTER TERM,—7 GEO. III. 1767.—K. B.

WRIGHT, Assignee of SCOTT, v. CAMPBELL.

S. C. 4 Burr. 2046.

When, and in what cases, an assignment of a bill of lading by a factor, transfers the property of the goods before their arrival.

IN action of trover for some wheat and beans, a special case was made: viz. 2 June, 1766, Lewis Fontaine shipped the goods, value 400*l*, from London to Liverpool, to be delivered "to order or assigns," and took two bills of lading. Fontaine indorsed one of the bills to Richard Swanwicke at Liverpool, or his order: who, being arrested for debt, applied to Richard Scott, another creditor of his for 800*l*., who had dealt with him in bills and notes, to become bail for him. He consented, on condition that Swanwicke gave him security, not only for the

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debt upon which he was arrested, but for his own debt of 800*l.* also. Swanwicke upon this indorsed the bill of lading to Scott, pretending the goods were his own. Next day Fontaine came down from London, and being informed of this transaction, applied to Scott, assuring him the goods were consigned to Swanwicke as a factor only; which was the truth; and indorsed the other bill of lading to the defendant, who, when the ship arrived, having given the master security, obtained possession. Scott afterwards became a bankrupt, and the plaintiff his assignee.

Wallace, for the plaintiff, argued, that the consignment of the bill of lading conveys the property (*Evans and Martlet*, Lord Raym. 271), as much as an indorsement of a bill of exchange. The assignee is not bound by any equitable right without notice. The trust should have been declared *for the use*, or *on account* of the consignor; and then the trust would *have been apparent. The contrary presumption arises upon the words "or order." [• 629]

Davenport, for defendant, insisted, that the bill of lading is only a promise to deliver goods to the consignor "or order;" *Whitecombe and Jacob*, Salk. 160. That a factor cannot pledge for his own debt, *Stra.* 1178(a). That the indemnity, being for *both* debts, is not a good consideration for the assignment to Scott, but carries a fraud on the face of it.

LORD MANSFIELD, C. J.—There is no difference between law and equity in this case. The assignee of a bond, &c. stands in the place of the obligee. In bills of exchange the drawer gives authority to negotiate it to a third person, who stands in the place of the drawee. If the property of a cargo at sea is transferable by indorsement, the indorsee must also be under the same circumstances as the original owner. This is also clear, that if the owner gives an authority to deliver goods to A. or B. without declaring whether factor or no, he retains a lien upon the goods, so far as they can be traced specifically, before they are sold. But, if sold, the factor only becomes the debtor. If the factor plays them over into another hand, either voluntarily without consideration, or with notice of the circumstances, the assignee stands just in the same place as the factor did (b). But if sold by the factor, while at sea (as they may be) without fraud or notice, the vendee then comes in under the authority of the owner (c). The whole, therefore, turns upon

(a) *S. P. Newson v. Thornton*, 6 East, 17, where *Le Blanc, J.*, said; "the case of *Wright v. Campbell*, appears, I think, to be that of a sale; for it was agreed that Scott, the indorsee of the bill, should sell the goods. But at least we may say of it, that it is not an authority for holding, that a factor may pledge the bill of lading, though he could not pledge the goods themselves." *S. P. Marini v. Coles*, 1 M. & S. 140; *Queiroz v. Trueman*, 3 B. & C. 342; *S. C.* 5 D. & R. 192.

(b) In 4 Burr. 2050, Lord Mansfield is

reported to have said; "If a factor pays the money over with notice to a third person, then it may be followed in the hands of such third person: for in such case it remains in his hands just as it did in the hands of the factor himself." So where B. a factor had pledged the goods of A. with C., who sold them for B., it was held that A. might maintain an action for money had and received against C. for the proceeds of the sale; *Fielding v. Kymer*, 2 Brod. & B. 639, *S. C.* 5 B. Mo. 518.

(c) As to the effect of assigning a bill of

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this point, whether there was an assignment, for good considerations, *bond fide* and without notice: Nothing of which is stated in the case. It is indeed a suspicious circumstance, that he should trust to the word of the factor Swanwicke, that they were his own. The bail was no consideration in this case; for the goods were not worth above 400*l.*, and the prior debt to Scott was 800*l.* But, as it does not appear to have been tried, whether fraudulent or no, I think there should be a new trial.

[*630] *YATES, J.—It seems doubtful, whether an indorsement of a bill of lading makes it negotiable in the same degree as a bill of exchange. It is only the master's acknowledgment of having received the goods. Swanwicke has a personal authority to sell. Can he assign that to Scott? The transaction has every circumstance of fraud, but we cannot determine it to be fraudulent.

ASTON, J.—Same opinion.

HEWITT, J.—Same opinion. A bill of lading differs from a bill of exchange, in that the consideration is delivered in the one case, and not in the other.

New trial ordered without costs.

lading, see *Lickbarrow v. Mason*, 2 T. R. case, p. 366), and *S. C.* 6 East, 20, n. (a); 68; *S. C.* in error, 1 H. Bl. 357, (and *Salomons v. Nissen*, 2 T. R. 674; *Cumming v. Brown*, 9 East, 506.

LONG v. DENNIS.

S. C. 4 Burr. 2052.

Devise on condition precedent, that if A. marries without a competent portion, or without consent [of trustees], the issue should not inherit, is performed, by having the portion only, without consent;

ROBERT Berriman devised lands to trustees in trust, to pay his son the yearly rents for life; then to the use of the son's widow for life, subject to the proviso after mentioned; then to his first and other sons in tail, subject to the like proviso; remainder to the testator's daughters in fee. The proviso was, "That if his son Robert should marry a woman not having a competent marriage portion, or without consent of his trustees; then the lands should go to the testator's two daughters in fee. And that the said proviso should not be construed or taken *in terrorem*, but should take effect." 18th October, 1730, the testator died: Afterwards Stevens, one of the trustees, married Mary one of the testator's daughters. In 1739, the son married, and died in 1765. The jury found, that the wife had a competent marriage portion, but was married without the consent of the trustees.

Gould, for the plaintiff, argued, that both parts of the condition ought to have been performed, and cited *Creagh* and *Ux.* [*631] *against *Wilson*, 2 Vern. 572, and *Carey* and *Bertie*, 2 Vern. 333 (d); and insisted, that this was a condition precedent with respect to the wife and issue.

Lord MANSFIELD, C. J.—Provisions in restraint of marriage

(d) And also *Harvey v. Aston*, 2 Com. R. 726, 1 Atk. 361.

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are extremely odious, and therefore construed strictly; and any liberal construction allowed to avoid them (e). They are contrary to public policy, and cruel in the parent, who can have no knowledge of circumstances that may arise after his death. They are all void by the Roman law; but in ours a distinction is taken. When they are conditions precedent, they are good; but if subsequent (unless there be a devise over), they are void, and construed to be only meant *in terrorem*. This shews the cruelty of the thing in the opinion of the Judges; else such a distinction could hardly be supported. The testator's saying, it shall not be construed *in terrorem*, is only making it doubly *in terrorem*. Even this has been strictly construed. *Dayly* and *Clanrickard* (f), in Chancery; the consent of trustees was made a condition precedent. They demanded a settlement: it was refused, and a private marriage had without consent: afterwards the husband made the settlement required. Lord *Hardwicke* held it a good performance of the condition. *Burlton* and *Humfrey* (g), Chan. 1755; a like case of *previous* consent in writing being made a precedent condition with a devise over: a subsequent consent held sufficient. These cases go farther and are much stronger than the present. This is quite new, and begins the forfeiture of the inheritance with the innocent issue. The offender is to enjoy the estate for his life. I have no doubt of the father's intention. He had no idea of a good wife, unless she brought a competent fortune: that is his first object. But if other qualities should be found equivalent (if possible) to money, he would not trust his son to determine in that case, but left it to the cool judgment of trustees. He could never mean, that both parts should at all events be fulfilled; that (if the trustees consented) a question might afterwards arise concerning the competency of the portion. Either of them performs the condition. *Another point is also material. One of the trustees is eventually become the person to take advantage of the forfeiture. The refusal of such a one is nothing, unless he shews a material reason. Otherwise, Chancery would decree him to consent.

YATES, ASTON, HEWITT, Js., same opinion.

Postea to the defendant.

(e) The reader is referred to a learned note in 2 Roberts on Wills, 335, n. (7), (3d ed.), upon conditions in restraint of marriage, where all the cases are collected, and among others those of *Peyton v. Bury*, 2 P. Wms. 626; *Scott v. Tyler*, 2 Bro. C. C. 431; and Mr. Eden's note, *ibid.* 489. and also to Mr. Fonblaque's Treatise on Equity, vol. i. 258, (5th ed.)—*Marples v. Bainbridge*, 1 Madd. 590; *Aislabe v. Rice*,

3 Madd. 256, 2 B. Mo. 358; 8 Taunt. 459, S. C.; *Lloyd v. Branton*, 3 Mer. 108, 117; *Duffield v. Elwes*, 1 Sim. & Stu. 239; 15 Vin. Abr. *Marriage* (K); Bac. Abr. *Legacies*, (F), p. 422. As to the distinction between conditions and conditional limitations, see *Gulliver v. Ashby*, *ante*, 607, and 617 n. (a).

(f) Or *Desbouwerie*, 2 Atk. 261.

(g) *Ambl.* 259.

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especially as one of the trustees became afterwards concerned in interest.

MORRIS v. MILLER,

S. C. 4 Burr. 2057; Bull. N. P. 28.

In actions for
crim. con. there
must be proof
of a marriage in
fact.

ACTION for criminal conversation with the plaintiff's wife. The only proof of the marriage was by reputation and cohabitation of the parties.

Per Lord MANSFIELD, C. J., and *tot. Cur.*—In these actions there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact: as by a person present at the wedding dinner, if the register be burnt, and the parson and clerk are dead (*h*). This action is by way of punishment: therefore the Court never interfere as to the *quantum* of damages. No proof in such a case shall arise from the parties' own act of cohabitation. The case of bigamy is stronger than this: and on an indictment for that offence, *Dennisson*, J., on the Norfolk Circuit, ruled, that though a lawful canonical marriage need not be proved, yet a marriage in fact, (whether regular or not), must be shewn (*i*). Except in these two cases, I know of none where reputation is not a good proof of marriage (*k*).

So in case of
bigamy.

Plaintiff nonsuited.

(*k*) *S. P. Birt v. Barlow*, 1 Doug. 171, where it was held, that an actual marriage might be proved by a copy of the register, if the identity of the parties was established, which the minister, clerk, or subscribing witnesses to the register, are not the only competent witnesses to prove, but which may equally be proved by the bell-ringers who rang the bells at the wedding; by persons present at the dinner; or by a maid-servant who should prove, that her mistress went always by the maiden name till the day of the marriage; that she went

out on that day, and on her return and ever since had been called by the name of the husband.

(*i*) Mr. East observes—"This it seems must be understood, where there is *prima facie* evidence of a marriage;" 10 East, 287, n. (*b*). See further as to proof of marriage on indictments for bigamy, 1 Russ. Cr. & Misd. 290; 1 East's P. C. 469.

(*k*) As to the proof of a marriage by reputation, see *St. Denereux v. Much Dew Church*, *ante*, 367.

[633]

FAIKNEY v. REYNOUS and RICHARDSON.

S. C. 4 Burr. 2069.

Money borrowed
to pay a stock-
jobbing con-
tract, though of
a partner in the
transaction, is
not within the

DEBT on bond, 23 February, 1765, for 3000*l*. Defendants pray *oyer* of the bond and condition, *viz.* for securing 1500*l*. and interest. Pleas:—1. *Non est factum*, and issue thereon. 2. That, since the statute 7 Geo. 2 (*l*), the plaintiff corruptly entered into several agreements for transferring sundry parcels

(*l*) C. 8, s. 5, by which it is enacted, "That no money or other consideration whatsoever shall be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving, any public or joint stock or other public securities, or for the not performing of any contract or agreement so

stipulated or agreed to be performed; but that such contract and agreement shall be specifically performed, and the stock or security agreed to be assigned, &c. shall be actually so done, and the money or other consideration shall be actually and really given and paid: and that every person offending shall forfeit 100*l*."

of stock on the joint account of himself and defendant Richardson, to be delivered at a certain time called the rescouter day, in February following; and, in performance thereof, corruptly, and contrary to the form of the statute, paid 3000*l.* to divers persons, for making up the differences in price for not performing said contracts; and that the bond was made for securing to the plaintiff 1500*l.*, being Richardson's moiety of said differences, and for no other consideration, and therefore void in law. The plaintiff demurs, and defendant joins in demurrer.

Lord MANSFIELD, C. J.—I am clear that this is no defence, even allowing it to be well pleaded^(m). Compounding differences for stock sold is not *malum in se*, but merely *prohibitum*. Where a thing is prohibited by act of Parliament, it is void as between the parties, and no Court of justice will allow a man to recover for what is made unlawful to be done. But this case is not within the act of Parliament. The bond is for money lent to another to fulfil a prohibited contract. If a man lends money to be lent upon usury, or to pay a gaming debt, can it not be recovered? There is no difference, whether borrowed of Faikney or of any other person.

YATES, ASTON, HEWITT, J_s, same opinion.

Judgment for the plaintiff⁽ⁿ⁾.

FAIKNEY
v.
REYNOL
statute, but recoverable.

(m) See 3 T. R. 424, and *Collins v. Biantern*, 2 Wils. 347.

(n) Though this case is supported by the decisions in *Petrie v. Hannay*, 3 T. R. 418, and *Watts v. Brooks*, 3 Ves. Jun. 612, yet its authority has been much impeached, if not even overruled by several subsequent cases. As where one *Bristow* had agreed with the plaintiff, an underwriter, to take half his risk, in contravention of stat. 6 G. 1, c. 18, s. 12. A loss having happened on a policy underwritten by the plaintiff, who paid the whole of it, *Bristow* paid his moiety into the hands of the defendant: it was held, that the plaintiff could not recover such moiety from the defendant; *Sullivan v. Greaves*, Park's Ins. 8 (ed. 1817). Again, it was determined in a similar case, that the plaintiff could not recover his share from the person who had been his partner in insuring ships. There *Eyre*, C. J., observes upon the case of *Faikney v. Reynous*, that there the bond was given to secure the repayment by a third person of his proportion of the money paid by the plaintiff in stock-jobbing, and that the case of *Petrie v. Hannay* was decided expressly on the authority of the former case; but that perhaps it would have been better, if it had been decided otherwise; *Mitchell v. Cockburns*, 2 H. Bla. 379; *Booth v. Hodgson*, 6 T. R. 405, *acc.* Again, where A. was employed by B. in stock-jobbing transactions, and paid the differences for him, and for part of the amount of them drew on B., and then indorsed the bill, accepted by B., to C.: it

was held, that C. could not recover on the bill; *Steers v. Lashley*, 6 T. R. 61; S. P. *Brown v. Turner*, 7 T. R. 630. Again, in a subsequent case, where it was decided, that money paid by one of two insurance partners on losses for the other, could not be recovered by the latter, Lord Eldon, C. J., said, that it was unnecessary to give a decided opinion on the determination in *Faikney v. Reynous*, since the circumstance of a specialty given to secure the money advanced, and which was there considered as amounting to a new contract, did not exist in the case then under consideration. And *Heath*, J., after observing that there was no sound distinction between the case of money paid in a concern, which is *malum in se*, and money paid in a concern, which is *malum prohibitum*, as both tend to encourage a breach of the law, intimated, that he did not mean to approve of the cases of *Faikney v. Reynous* and *Petrie v. Hannay*; *Aubert v. Maze*, 2 Bos. & Pul. 371. And in a case, where all the determinations on this subject are cited and discussed, it was decided, that where the plaintiff and defendant, being prisoners of war, obtained their liberation, &c. contrary to 45 G. 3, c. 72; to effect which, the plaintiff lent the defendant money, for the amount of which the defendant indorsed a bill to him, he could not recover on the bill against the defendant; *Webb v. Brooke*, 3 Taunt. 6, and see the observations of *Lawrence*, J., pp. 10, 12; and *Ex parte Mather*, 3 Ves. Jun. 373. The ground on which the principal case is distinguish-

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v.
REYNOLD.

able from those cited, is, that in it the action was on a specialty: in other respects they are similar as far as regards Richardson, as he was a partner in the transaction, though this does not appear in the report

in 4 Burr. 2069; and therefore the distinction taken by *Eyre*, C. J., in 2 H. Bl. 381, is not well applied as to him. See also *Bensley v. Bignold*, 5 B. & A. 335; *Jaques v. Golightly*, post, 1073.

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TRINITY TERM,—7 GEO. III. 1767.—K. B.

THE KING v. DAWES.—THE KING v. MARTIN.

S. C. 4 Burr. 1962, 2022, 2120.

Informations in
nature of *quo*
warranto denied
after long acqui-
escence and
other circum-
stances.

THESE were motions for cross informations, in the nature of writs of *quo warranto*, for the office of burgess of Winchelsea.

Lord MANSFIELD delivered the opinion of the Court.—There are two qualifications requisite to this office; residence, and payment of scot and lot. Dawes was elected 17th September, 1747; was not then resident, but was town-clerk; and, since his election, hired a house, and has resided, and paid scot and lot ever since. Two of the three informers concurred in his election. All three have since acted with him without any objection till within nine months past. He has served the offices of jurat and mayor. Many derivative rights depend on his election: Perhaps the existence of the borough. No good reason can be assigned for the present prosecution. The end of the constitution is answered by the subsequent residence. No public right is infringed, or new constitution formed by the continuance of Dawes in this office. Therefore upon these three grounds taken jointly, and not separately, 1. The behaviour and long acquiescence of the informers knowing the disqualification; 2. The motives of the informers for now moving it; and, 3. The probable consequences to the borough of granting this information; we are all of opinion, [*635] *that it would be contrary to the trust reposed in this Court by the statute of Queen Anne for quickening the amotion of usurpers, to permit these informers to have the assistance of the Court in this case thus circumstanced. Martin was elected, 1 October, 1753. No objection then made, or ever since. It is objected now that, though resident, he did not then pay scot and lot. There are similar circumstances of acquiescence in the informer. Martin occupies a tenement of 10*l.* per annum, and has a freehold besides. By a rate made in the middle of October, 1753, he was rated from the Easter preceding, and has been rated ever since. These are opposite applications; and, though one case is stronger than the other, yet both are strong enough, and the difference ought not to be nicely weighed.

Both rules discharged (a).

(a) See *R. v. Lathorp*, ante, 470, n. (t).

THE KING *v.* TAVISTOCK.

S. C. Burr. Sett. Ca. 578.

ROSAMOND Cock, his wife, and three children were removed from Tavistock to Kelly. On appeal the Sessions reverse the order, stating, that the pauper was bound apprentice by the parish of Lamerton to Richard Rundle, with whom he lived several years in that parish. Then Rundle assigned him to John Prout, of Milton Abbot, with whom he lived till twenty and an half years old, when he offered his service to Thomas Mason, of Kelly; who, apprehending he was apprentice to Prout, sent to ask his consent for Cock to live with him, who replied, "with all his heart, he might live with Mason or any "one else, provided he performed his agreement with him," viz. to pay him a guinea a year. Upon which Mason took him, and he lived with him at Kelly during the remainder of his apprenticeship.

Apprentice assigned to A. and going to live with B. on condition to allow A. a guinea yearly, gains a settlement by the first forty days' residence with B.

Thurlow, in support of the order of Sessions, argued, that there is no settlement in Kelly. An infant cannot consent to transfer his service, nor can it be done without his consent. * Nor can parish apprentices be transferred without the interposition of the justices (*b*).

[*636]

Norton, on the same side, admitted, that though an apprentice cannot be legally assigned, yet if assigned in fact and he lives forty days with the assignee, he gains a settlement. Nay, that if the administratrix of the master, before administration granted, turns him over, he may gain a settlement by residence (*c*). Or that if the assignee of an apprentice assigns him to another, the service with the second assignee will give a settlement, because this is an implied consent of the first master; *K. and Inhabitants of Clapham* (*d*), 20 Geo. 2. But, here is no consent of Prout. The leave was conditional, and that condition was never agreed to by the apprentice, which amounts to the same as a refusal.

But *per Cur.*—There is no doubt but there was a general consent given by Prout. The guinea was not payable till the end of the year, and the settlement is gained in the first forty days (*e*).

Order of Sessions reversed.

Order of Justices confirmed.

(*b*) See *R. v. Austrey*, Burr. S. C. 441, and *Ecclesiastical Brierlow v. Warlow*, ante, 592. A parish apprenticeship cannot be dissolved without the consent of the parish officers, (the apprentice being a *minor*), even though his father consent; *R. v. Langham*, Cald. 126. But such assent of the parish officers is unnecessary after he comes of age; *R. v. Harberton*, 1 T. R. 139. It does not seem necessary to have the interposition of the magistrates.

(*c*) *R. v. East Bridgeford*, Burr. Sett. Ca. 133, 2 Stra. 1115. So the executrix, *R. v. St. Paul's, Bedford*, 6 T. R. 452.

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But see *ante*, 555, n. (*m*).(*d*) Burr. Sett. Ca. 266, 1 Wils. 158.

(*e*) A general consent is not sufficient, unless the master receive some benefit from the service of the apprentice in his subsequent situation, as in the principal case. So where the apprentice was to be at liberty to work for his own benefit, upon paying his master 12*d.* a week, he gained a settlement where he worked for another tradesman, his master occasionally demanding the stipulated 12*d.* a week; *R. v. Offerton*, Burr. Sett. Ca. 802. See also *R. v. Shebbear*, 1 East, 73.

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MAYOR OF NORWICH v. BERRY.

S. C. 4 Burr. 2109.

An attorney is privileged from serving corporation offices, though resident in the corporation town.

ACTION of debt by the Corporation of Norwich for 40s. on a by-law, for not serving the office of sheriff there, being duly elected. The defendant pleads his privilege as a practising attorney in the Common Pleas, and that, by the custom of that Court, no attorney ought to be drawn away to attend any other office than in the said Court; that the sheriffs of Norwich, upon their admission, take an oath to be resident within their bailiwick; and that, before his election, he brought a writ of privilege, of which the Corporation had notice; and that therefore he refused to serve. The plaintiffs reply, that the defendant for twenty years past hath been, and still is, an inhabitant of Norwich, 100 miles from the Court of Common Pleas at Westminster: the defendant demurs, and plaintiffs join in demurrer.

[*637] *For the defendant were cited, Cro. Car. 389, *Prowse's Case*; Noy, 112; Cro. Car. 11; 2 Stra. 1143, *Barnes*, 42, *Heaton's Case*; 1 Ventr. 16, 29, *Stone's Case*; *Officina Brev.* 146, 166, 174; 1 *Barnes*, 29(f).

For the plaintiffs, Savil. 43; 6 Mod. 140, *T. Jones*, 46.

But the Court were unanimously of opinion, that the privilege of the Court of Common Pleas protected him, notwithstanding his residence at Norwich (g).

But, *per* ASTON, J.—By rule of Court, *A. D.* 1654, no attorney, that has left off practice for a year, shall be privileged (h).

Judgment for the defendant.

(f) P. 37, 8vo. ed.

(g) See *Gerard's Case*, post, 1123, and Vin. Abr. *Attorney*, (K 3); Com. Dig. *Id.* (B 16); Bac. Abr. *Privilege*, (A).

(h) *Prior v. Moor*, 2 M. & S. 605, con-

tra, where the Court doubted the validity of the rule of 1654, and thought it only applied to the year then last past. See also *Dyson v. Birch*, 1 Bos. & P. 4; *Dykes v. Wilton*, 4 B. & A. 88.

THE KING v. EDWARDS and SYMONDS.

S. C. 4 Burr. 2105.

On attachment defendant cannot confess the contempt till the interrogatories are filed.

THE defendants were justices of the peace of St. Ives in Cornwall, and had evaded the signing of a poor's rate, in obedience to a writ of *mandamus*, by keeping out of the way, so as not to be served with the writ; and an attachment was granted for the contempt.

Morton, for the defendants, and *Thurlow*, moved, that the defendants might come in and plead guilty to the contempt, and receive the judgment of the Court without answering to interrogatories; and cited *K. v. Burridge*, M. 9 Geo. 1, where the defendant present in Court acknowledged the contempt, *prout* charged in the affidavits, and a fine was imposed upon him for the same, without his personal appearance; upon the

undertaking of his clerk in court to pay the fine and the prosecutor's costs.

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v.
EDWARDS.

But, *per Cur.*—The motion is irregular, and cannot be granted, if opposed, (as it was by Sir *Fletcher Norton* and others), for the *K.* and *Burridge* appears upon the face of it to have been by consent. The attachment itself is mesne process to bring in the party, and bailable; and there is no charge till the interrogatories are filed: if then you will come in and confess *the matter charged in the interrogatories, you are at liberty to do so, but not before. If improper interrogatories are administered, the party may refuse to answer them; but we give no opinion as to the mode of refusal. There is a difference between an attachment for non-payment of costs and the like, which is in nature of an execution, and one for an actual contempt, which is only to compel an appearance.

[*638]

(See Bac. Abridgm. tit. *Attachment*)(i).

Motion over-ruled.

(i) See also *R. v. Wheeler*, ante, 311; *R. v. Elkins*, post, 646.

MOORHOUSE v. WAINHOUSE.

IN trespass; the defendants justify under the title of Samuel Appleyard, to which the plaintiffs reply, and the defendants demur to the replication. The case, upon all the pleadings, appeared to be this:—John Appleyard, and Martha, his wife, 1st December, 1725, by a deed to lead the uses of a fine, Hil. 12 Geo. 1, settled the premisses (being the wife's inheritance) to the use of said Martha for life; remainder to John Appleyard for life, if he and the said Martha should have any issue that should so long live; remainder to all such children in fee, as tenants in common. If Martha should die without such issue (k), or all such issue should die before twenty-one; then,

Settlement of the wife's estate on herself for life, remainder to the husband for life if any issue of the marriage so long live, remainder if she dies *sans* issue of one moiety to him in fee, and of the other to the wife's relations; his remainder in fee does not arise, unless he survives his wife.

(k) "This word *such* plainly confines the issue to issue of her by her then husband, and consequently at his death there could be none, unless she was *enfeinte*; and therefore *quære*, whether the possibility of a posthumous child would prevent the vesting of the contingent remainder in fee, limited to the husband on the event of there being no issue of Martha by him; for it is sufficient if a remainder vest *eo instanti*, that the particular estate determines. If it did vest, then the subsequent recovery could not bar it [*Doe v. Reason*, cited 3 Will. 244, and see *Doe v. Holmes*, post, 777], unless Martha was tenant in tail, and it seems impossible to support any construction of the deed, by which she could take more than an estate for life in the moiety limited to the husband in fee on the contingency of her death without issue of the marriage: and if the possibility of posthumous issue did not suspend the vesting of the remainder to the husband in

fee, nothing else could; for if the case be stripped of that circumstance, it is reduced to a mere limitation of a remainder after a bare estate for life;" *MSS. Serj. Hill*.—And even if the possibility of posthumous issue did suspend the vesting, the recovery must have been suffered during Martha's pregnancy: but by 10 & 11 W. 3, c. 16, posthumous children are put on the same footing as children born in the life-time of the ancestor; see *Doe v. Quartley*, 1 T. R. 634. See the real ground of the decision in the next note.

If the limitation had been, "if M. should die without issue" generally, the contingency could not have arisen till her decease: in which case the remainder to the heirs of J. A. in fee would undoubtedly have been contingent, and the tenant for life, by her recovery before issue born, would have gained a tortious fee: yet the heirs having the ultimate reversion, would have had a right of entry to be exercised

MOORHOUSE
*
WAINHOUSE.

as to one moiety, to John Appleyard in fee, and as to the other moiety, to Susanna Mitchell, mother of said Martha, for life, and to the appointees of said Susanna and her second husband, and, in default of appointment, to said Susanna in fee. Proviso, that John Appleyard and Susanna Mitchell should pay 2*l.* 2*s.* to one John Rishworth; and, in default, the trustees to enter and raise the same out of the rents and profits. 10th August, 1741, John Appleyard died. Martha intermarried with Richard Shackleton, who also died: and by lease and release, 26th and 27th October, 1764, Martha Shackleton makes a tenant to the *præcipe* for a recovery, which was had the same Term, and the uses declared to Martha Shackleton in fee. [*639-] *21st December, 1764, Martha Shackleton devises the premises to the plaintiffs, who bring this action against the defendant, who claims under Samuel the brother and heir of John Appleyard.

This Case was argued in Easter Term by *Wallace* for the defendants, and *Walker* for the plaintiffs; and, in this Term, by *Coxe* for the defendants: But *Blackstone*, for the plaintiffs, was prevented from going on by the Court, who were clearly of opinion, upon all the circumstances of the case, that the contingency, on which it was intended that the estate of John Appleyard should arise, was that of his surviving his wife; and that, as he died first, the contingency never arose. The other points made by the counsel—whether this was an estate for life, or in fee tail by implication in Martha; and whether, as the estate was contingent and never vested in the husband, it can now vest in his heirs, were not resolved by the Court; who upon the first point only gave

Judgment for the plaintiff (*l.*)

within five years: see *Carter v. Barnardiston*, 1 P. Wms. 509, 520: *Loddington v. Kime*, 1 Salk. 224, 225. Now this being an estate of the wife's inheritance, the reversion would be in her heirs; and therefore in this view of the case, the defendant would have had no title. And if her heir had not entered for the forfeiture, still would he have been entitled under the uses declared of the recovery. However, this supposed case could not take place, for, by the limitation, "if she should die without issue," she would take an estate tail by implication, and the recovery would have been well suffered.

(*f*) This case is adduced by Mr. Fearne as one of those, where the existence of the devisee, &c. of the contingent interest, at some particular time, may by implication enter and make part of the contingency itself, upon which such interest is intended

to take effect; F. C. B. 364: and as an exception to that class of cases, where a contingent remainder of inheritance is transmissible to the heirs of the person, to whom it is limited, if such person chance to die before the contingency happens; *Ibid.* But here there could not have been any contingent remainder to be transmitted; for it would be a vested one immediately on the death of J. A., as observed in the preceding note.

Another question arises; whether the devise by Martha, was a devise of the fee limited to her by the recovery deed, or of her old reversion. For if no recovery had been suffered by her, she would have had a life estate under the settlement, and (the remainder in fee to J. A. having failed) the reversion in fee, it being land of her own inheritance.

MICH. TERM,—8 GEO. III. 1767.—K. B.

THE KING v. ELKINS.

S. C. 4 Burr. 2129.

AN attachment had issued against the defendant for a rescue of a person taken upon mesne process: and Sir *F. Norton* now moved, that the defendant might be at liberty to come in and submit to a fine without answering to interrogatories.

On attachment for rescue the defendant may be fined without answering interrogatories.

Per Cur'. The case of a rescue differs from most other contempts, in that here the whole fact is acknowledged, and cannot be made more certain than it is by answering to any interrogatories. The case would be the same, if an attachment were to issue for a contempt in the face of the Court. The Court in such cases wants no farther information. So granted the rule; and the defendant was the next day brought up and fined 5*l.* (a).

(a) But see *R. v. Bell*, Salk. 586, *R. v. C. c. 22, s. 34*; Tidd's Pr. 260 (ed. 1821); *Horsley*, 5 T. R. 362; Com. Dig. *Rescous*, *R. v. Edwards*, ante, 637. (D 6); Bac. Abr. *Rescous*, (C); 2 Hawk. P.

THE KING v. DR. HAY.

S. C. 4 Burr. 2295.

BLACKSTONE moved for a *mandamus* to the Judge of the Prerogative Court, to grant administration of the effects of the late General Stanwix to Charles Connor, Esq., his nephew and next of kin, on a suggestion supported by affidavits of the General's death; that there were then living no children, wife, or other relation in the same or any nearer degree; that he had applied for letters of administration, but was refused on pretence of two caveats, one entered by Mr. Holmes, and another by Mr. Stillingfleet: That Stillingfleet was only first cousin to the General, and therefore one degree more remote than Mr. *Connor, but that Mr. Holmes's claim (who was brother to the General's first wife) arose upon this extraordinary accident: That in October, 1766, General Stanwix, his second wife, and his daughter by the former wife, set sail in the same vessel from Dublin for England; that the vessel was lost at sea, and no account of the manner of her perishing had ever yet arrived. Whereupon Mr. Holmes, as maternal uncle and next of kin to Miss Stanwix, claimed the effects, under a notion of the civil law, that where parent and child perish together, and the manner of their death is unknown, the child shall be supposed always to survive the parent (b).

Mandamus for administration to the next of kin, notwithstanding a suit depending, his consanguinity not being denied.

[*641]

But *Blackstone* insisted, that, supposing this to be the rule universally, and that the rule of the civil law ought to govern

(b) As to this presumption, see Starkie's Evid. P. iv. pa. 1236, n. (c).

THE KING
v.
DR. HAY.

in this case, both which were much to be doubted; yet still that could be only a question upon the statute of distributions; whereas he moved upon the statute of administrations: and as Mr. Connor was now the indisputable next of kin to the General, he was entitled to letters of administration, being already in possession of the real estate. The Court granted a rule to shew cause, with notice to Holmes and Stillingfleet.

Thurlow and *Dunning* shewed cause for Stillingfleet and Holmes.—1st. That Stillingfleet was in equal degree with Connor by the canon and common laws(c), and therefore no *mandamus* could go to take away the election of the ordinary. But *per Cur.*—The computation of degrees in these cases must be according to the civil law. 2d. That there was a *Lis pendens*(d) in the Spiritual Court, which had competent jurisdiction of the question, wherein the interest of Mr. Connor was denied and now in a course of trial. This was allowed (if true) to be a sufficient cause, but the Court refused to hear affidavits concerning it; but required a transcript of the proceedings in which nothing more appeared but a general denial of the plaintiff's interest, as is usual in every stage of their proceedings, and not of his consanguinity as stated in his own affidavit. And therefore the Court, without hearing counsel in support of the rule, made it absolute for the *mandamus*, upon the ground of its being for the administration only (and not the distribution) *to which Mr. Connor was clearly entitled under the statute; but had been kept out of it a twelvemonth without any apparent reason(e).

[*642]

(c) *Mentney v. Petty*, Prec. Ch. 593, 2 Ab. Eq. Ca. 424; *Lloyd v. Trench*, 2 Ves. 213; 2 Bla. Comm. 504.

(d) See *Loeegrove v. Bethell*, post, 668, and *R. v. Dr. Harris*, ante, 430.

(e) *Anon.* 1 Stra. 552; *R. v. Bettsworth*, 2 Stra. 891, 956, 1111, 1118; *Stewart v. Eddy*, 7 Mod. 143; *Anon. Andr.* 24; *Smith's Ca.*, 2 Stra. 892.

HILARY TERM,—8 GEO. III. 1768.—K. B.

CLARKE v. RYALL.

The Court will not assist, upon motion, the relation of an act of bankruptcy.

ON a judgment against the defendant, who was then a prisoner, a *fiery facias* was sued out by the plaintiff, and his goods taken and sold by the sheriff. The defendant still continued in prison till two months were elapsed, whereby he became a bankrupt, and a commission issued against him. And now *Wallace* moved, that the sheriff might pay over the money to the assignees, who were entitled (as he insisted) thereto by relation to the time when the defendant first went to prison(a). *Norton*

(a) The act of bankruptcy relates to the time of the party's first going to prison or being in actual custody upon the arrest; or if bail has been put in, to the first day of his surrender: and the day of the arrest,

&c., is to be taken into the computation of the two lunar months; *Barwell v. Ward*, 1 Atk. 260; *Tribe v. Webber*, Willes, 464, Davies, 376, S. C.; *Rose v. Green*, 1 Burr. 437, 439; *Coppendale v. Bridgen*,

shewed for cause, that before the two months were expired or the commission issued, the sheriff's officer had paid the money to the plaintiff; which fact was sworn by the officer, though there appeared some suspicious circumstances to the contrary. Upon this *Wallace* changed his motion, and desired that it might be tried on an issue, whether the money was *bonâ fide* paid to the plaintiff before the commission issued, as the justice of the case is with the assignees, in case the fact turned out that it was paid afterwards. But by *Cur'*. This is a case *strictissimi juris*; and the relation, of which the assignees would take advantage, an odious one. Therefore we will not assist it. You could not bring an action against the sheriff for the money (*b*), because that would affirm the execution. As therefore you could have *no advantage in the regular course of [*643] law, you shall not obtain it upon it upon motion.

Rule discharged.

2 Burr. 814; "The only distinction to be taken between this and other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themselves, whereas this is a complicated matter, and is inchoate till the party has lain in prison two months, and therefore the act of bankruptcy is not complete till the expiration of that time. But I do not think that makes any difference; for as soon as the two months are expired, it relates back to the time of the arrest, and then operates, as if the arrest were a complete act of bankruptcy in itself: *per Ashurst, J.*, in *King v. Leith*, 2 T. R. 141; *Barnard v. Palmer*, 1 Camp. 509; *Glasington v. Rawlins*, 3 East, 497; *Thomas v. Desanges*, 2 B. & A. 586.

But now by 6 G. 4, c. 16, s. 5, if a trader arrested for debt, or on an attach-

ment for non-payment of money, shall lie in prison for twenty-one days; or being in prison for any other cause shall lie in prison twenty-one days after any detainer for debt lodged against him, he commits an act of bankruptcy.

(*b*) See *Cooper v. Chitty*, *ante*, 65 and notes. But the assignees might recover the money from the plaintiff; see *Coppendale v. Bridgen*, 2 Burr. 818, 820; and they might bring either trover or money had and received at their election; see *Hitchin v. Campbell*, *post*, 827.

Executions *bonâ fide* levied more than two calendar months before commission, without notice of the bankruptcy or insolvency, are now protected by 6 G. 4, c. 16, s. 81.

BARNES v. FOLEY.

S. C. 4 Burr. 2149.

IN an action against the Postmaster of Bath, the Court determined that a country postmaster hath no right to demand money for the delivery of post letters in the town where the post office is kept, but gave no opinion concerning the duty of such postmasters to deliver letters at private houses without any fee or reward. And therefore, upon the first point only, gave

Postmaster in a country town cannot demand money for delivering letters at private houses.

Judgment for the plaintiff (*c*).

(*c*) *Smith v. Powditch*, 1 Cowp. 182; *Rowning v. Goodchild*, *post*, 906, *acc*. See 46 G. 3, c. 92, s. 2, 3.

HARRIS v. BARNES and Others.

S. C. 4 Burr. 2157; Ambli. 666.

Devise to A. for ninety years, if he so long live; remainder to the heirs of his body; and, subject to these estates and contingencies, to B. in tail; remainder to C. in fee: The heirs of the body of A. take an estate tail by executory devise.

A CASE out of Chancery. Dr. George Coningsby, by his will, dated 15th February, 1766, devised his manor of Grendon Warren, in the county of Hereford, to his kinsman, "Coningsby Harris, for the term of ninety years from the testator's decease, if he should so long live; and after the determination of that term, to the heirs of the body of said Coningsby Harris; remainder to Susan Elletson for ninety years from the decease of the said Coningsby Harris, he dying without issue, if she shall so long live: And, subject to the estates and contingencies before mentioned, to Roger Elletson, her son, for life; with remainder to his first and other sons in tail male, remainder to the right heirs of Susan Elletson in fee." The testator died 15th March, 1766, leaving the defendant, Barnes, his sister and heir at law. Coningsby Harris, the plaintiff, who hath at present no children, entered; Susan Elletson died, leaving the said Roger Elletson, her only son and heir at law, who hath also at present no issue. The question stated, by the Court of Chancery, is, "Whether the heirs of the body of the plaintiff Coningsby Harris take any, and what estate, under the said testator's will?"

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* *Salisbury Jones*, for the plaintiff, argued, that such heirs take an estate tail as purchasers; not by way of contingent remainder, for want of an estate to support it, but by way of executory devise. The time during which an executory devise may expect, is now settled; a life or lives in being and twenty-one years after: This within the rule. It must be known on the death of Coningsby Harris, whether he will leave heirs of his body. This is not a present and immediate, but a future and executory devise; and notwithstanding the idle distinctions formerly made between *verba de præsenti*, and *de futuro*, if a future estate be intended, the Court will not now regard the grammatical nicety of the words. But even were it meant as a remainder, if it cannot take effect as such, it shall enure as an executory devise: So held, in *Hopkins v. Hopkins* (d). In the mean time the freehold descends to the heir at law; *Carter and Barnardiston*, 1 P. Wms. 505; *Plunket and Holmes*, 1 Lev. 11 (e); *Gore and Gore*, 2 P. Wms. 28. And he relied on the Case of *Doe v. Carlton* (f), B. R. T. 1745, almost *in terminis* the same case with this; wherein the Court held, that the heirs of the body took an estate tail by executory devise, and that, in the mean time, the fee descended to the heir at law.

Blackstone, for the defendant, argued, that the question was inaccurately stated; viz. what estate the heirs of the body of Coningsby Harris now take, who is living, and can therefore

(d) Ca. temp. Talbot, 44.

(f) 1 Wils. 225, and see *Gulliver v.*

(e) S. C. T. Raym. 30, where this point is mentioned.

Wicket, Id. 106.

have no heir, and hath no child, and can therefore, under the present state of the case, have no heir of his body. But supposing it to mean what estate such an heir, in case he ever exists, will take, it is incumbent on us to contend that he will take nothing. For though it seems the intent of the testator to give him an estate tail, yet that intent cannot be carried into execution consistently with the rules of law. 1st, He cannot take it as a contingent remainder, for want of a freehold to support it; *Goodright* and *Cornish* (g); *Gore* and *Gore*, first certificate expressly, second certificate impliedly. 2d, Not as an executory devise; because, first, the contingencies are too numerous and too remote: first, that Coningsby *Harris shall [*645] have issue; next, that he himself shall die during the term of ninety years; lastly, that the issue shall survive the term. But, principally, because no interim estate descends to the heir at law to support the executory devise. This is absolutely necessary, else the freehold would be in abeyance till the contingency happens or fails; and no act of parties can put a freehold in abeyance. In *Gore* and *Gore*, the limitation over was, "in default of such issue;" so that the remainder-man's estate did not commence till the default happened: and therefore the Court held, in the second certificate, that an interim estate descended to the heir at law. But here the devise is *immediate* "to Roger Elletson, &c. subject to these estates and contingencies." It vested in him therefore by purchase at the death of the testator; and being once so vested by *purchase*, it cannot be divested by a future contingency, as it might have done had it vested by *descent*: according to the known distinction between estates which vest by *descent* and *purchase*: 3 Rep. 61 b, *Lincoln College Case*; 1 Rep. 95, *Shelley's Case*. But afterwards, in the same Term, the Court declared that they should certify (h), that the heir of the body of Coningsby Harris would take an estate tail by executory devise; the contingencies not being too remote, as they must all determine at the death of Coningsby Harris. They also held, that while the contingencies subsisted the freehold was undisposed of, and descended to the testator's heir at law (i). It is the same case as that of *Robert de Mandeville*, Co. Litt. 26 (k).

(g) 1 Salk. 326, and *Scatterwood v. Edge*, Id. 229.

(h) See the certificate, 4 Burr. 2162; by which it appears, that the Court were of opinion that the only determination of the ninety years' term in the testator's view was the death of C. H., and that the clear manifest intent of the testator was to give an estate tail to such person as should be heir of the body at the death. This case is cited by Mr. Fearne as an autho-

riety to shew, that the distinction between a devise *per verba de presenti* and one *per verba de futuro* is not attended to, unless the intent be very clear, that the testator meant nothing else but a devise *in presenti*; F. C. R. 532. See also *Goodman v. Goodright*, ante, 188.

(i) See Fearne, C. R. 351 (8th ed.); and *Nicholl v. Nicholl*, post, 1161, and n. *ibid*.

(k) Fearne, C. R. 40, 80.

WELLINGTON v. WELLINGTON.

S. C. 4 Burr. 2165.

Devise on default of issue of his own body, being a bachelor, is merely a conditional devise, and good if the testator dies without ever marrying.

A CASE out of Chancery. Richard Cary, by will, 29th July, 1757, *imprimis*, directs all his debts to be paid: *Item*, "in default of issue of his own body, devises his manor of Wilcot, &c. to John Arrowsmith and James Simmons, and their heirs; in trust, to pay his sister, Elizabeth Wellington, an annuity of 100*l*. till his debts and legacies were paid. And, after payment thereof, he devises it to Elizabeth Wellington for life, with divers remainders over in strict settlement; and makes Arrowsmith and Simmons trustees to preserve the contingent remainders: remainder to his heir at law." The testator died a bachelor, leaving said Elizabeth Wellington and Jane Collins his heirs at law. *Qu.* Whether Arrowsmith and Simmons, the trustees, took any, and what estate?

Blackstone, for the plaintiffs, the remainder-men, argued,—1st, That the trustees took a base fee, determinable when the rents and profits of the testator's estate should have paid his debts and legacies. If it is objected, that this devise, being after an indefinite failure of issue, is an executory devise, and the contingency too remote to support it,—he answered; it is not an executory devise, but a conditional will depending on a precedent condition, upon which the testator intended the whole should take effect or otherwise. Meaning to dispose of his estate, but afraid, lest upon a change of his condition, he might die without altering his will, he revokes the whole conditionally, that he married and had issue of his body. Perhaps it was *abundans cautela*. The law might have done it for him. On such a change of circumstances, a will of personal estate is revoked; Lord Raym. 441; Salk. 592; 2 Show. 242. It may be the same as to land; 1 P. Wms. 304, Eq. Cas. Abr. 413. *Parsons and Lane* (l), in Chancery, H. 22 Geo. 2; "In case I die before my return from Ireland, I will, &c."—held a conditional will, though the testator returned, and in his last illness directed his attendants where they might find this will. "In default of issue" differs from the expression "on failure of issue." The one implies that A. never shall have issue; the other, that he shall have it and it afterwards fail. The first contingency must be determined at his own death; the latter may be suspended for ages. This conditional clause is placed at the beginning of the will, and operates over every subsequent clause, every limitation and legacy; all which would have been void in case he had married and left issue. He expresses no more than the law would probably have implied, but lest the law should not imply it, he has taken care to express it.

2d, That if the will was not conditional, still the devise to the trustees is a present interest, and not an executory devise. An

(l) 1 Wils. 243, 1 Ves. S. 189, Ambl. 557. See *Brady v. Cubitt*, 1 Doug. 81; and *Doe v. Lancashire*, 5 T. R. 49.

executory devise is a future interest, which *cannot vest at the death of the testator*, but depends upon some contingency, which must happen before it can vest; *Gilb. Devis.* 49; *Cas. Equ. Abr.* 186 (m). The present devise must vest at the death of the testator or not at all. If he left no issue, they take an estate in possession; if he left issue, that issue would take an estate tail by implication, (*Walter and Drew*, Com. 372 (n)), and then the trustees would have a vested remainder expectant thereon. 3d, That if it be an executory devise, the contingency is not too remote to support it. "*On default of his own issue*," must mean issue "*living at his death*" (o). All the cases where executory devises, upon a general failure of issue, have been held too remote, have been, where the contingency depended on the issue of a third person, not of the testator himself. What are the trusts of this estate? To pay debts, legacies, and annuities. He could not mean to postpone them to an indefinite failure of his own issue, if he had happened to have any. His meaning was to give a present estate for these purposes, in case he died without any issue, and not otherwise; having provided for his debts (in case he left issue) by the first clause in his will.

Dunning, Solicitor-General, for the defendants the heirs at law, argued, that it was an executory devise depending on the general failure of issue: because if the words "*living at my decease*" are not expressed in such devises, it is always understood to be a general failure of issue. That it cannot be a conditional will; because it would be nugatory to make a provision for revoking his will, in case he married and had issue; since the law would do it for him. And he insisted, that it could not, in any contingency, operate as a remainder expectant on an estate tail; because no man by his will can give an estate tail to himself.

The Court afterwards certified, in the same Term, that the trustees took a base fee, determinable on the payment of the testator's debts and legacies, out of the profits of the estate: and (*ut opinor*) principally upon the idea of the will's being merely conditional, in case he left no issue of his body.

(m) *Fearne's C. R.* 381 (8th ed.), 2 Wms. Saund. 388 a.

(n) *Doe v. Ellis*, 9 East, 382, acc.

(o) *Accord. French v. Caddell*, 3 Bro. P. C. 257 (2d ed.); *Jones v. Morgan*, Id. 323, *Fearne*, C. R. 451 (8th ed.), and *Lytton v. Lytton*, 4 Bro. C. C. 441; where *Ld. Loughborough*, C., observed, "that the principal case, and two cases here cited, were cases, where taking the words strictly, and construing them blindly without considering the circumstances, would have been upon a general failure of issue, and therefore void;" the whole of that case should be perused. There seems to be a distinction between wills of realty

and of personalty: in the former, a dying without issue means an indefinite failure of issue, and may give the devisee an estate tail; in the latter the same words mean issue living at the death of the testator; for if the same construction were put upon the latter as upon the former, it would give the legatee the absolute disposal, as there is no estate tail of personalty: As to the learning on this head, see *Fearne's C. R.* 444, *et seq. Crooke v. De Vandes*, 9 Ves. J. 303; *Dansey v. Griffith*, 4 M. & S. 61, and *Doe v. Webber*, 1 B. & A. 713, are modern cases on this subject: see also 2 Wms. Saund. 388 c, and *Goodman v. Goodright*, ante, 188.

THE KING *v.* Lord BALTIMORE.

S. C. 4 Burr. 2179.

[Bail taken on a charge of rape under particular circumstances.]

WARRANTS had been issued by Sir John Fielding and Mr. Kelynge to apprehend his Lordship, on the oath of Sarah Woodcock, for a rape, and Mrs. Harvey and Mrs. Griffenburg for being accessaries before the fact. She had sworn that she was inveigled into Lord Baltimore's house in Southampton Row, where she was confined five days, during which she neither eat nor drank; and upon her still refusing to comply with my Lord's will, she was carried down by force to his house at Woodcot in Surry, where the two women forcibly lifted her into bed to Lord Baltimore, and left her there; and that he actually ravished her. On the last day of the Term, Lord Baltimore and the women surrendered themselves into Court; and *Eyre*, Recorder of London, now moved to admit them to bail, which was admitted to be of course with respect to the accessaries (*p*). He opened several affidavits from his Lordship's domestics, proving that the prosecutrix had been for five days in the house without any restraint, and behaved remarkably cheerful before and immediately after the time that the rape was sworn to; particularly the next morning at breakfast, when she made up wedding favours, with her own hands, for herself, Mrs. Griffenburg, and Mrs. Harvey; together with many other circumstances that tended to make her evidence suspicious: particularly that she declared to an attorney, (who was sent for by Lord Baltimore when the affair began to make a noise), and also signified in a letter to her father, that she wished to stay with Lord Baltimore. And, when an *habeas corpus* was brought before Lord MANSFIELD by her father, his Lordship could best inform the Court of what passed upon that occasion; (which was generally supposed to be, that she desired, when privately examined, to go back again with Lord Baltimore; she being then *sui juris* about twenty-seven years old).

Lord MANSFIELD declared, that his clerk was present when he examined her, and would in due time give a proper account of it; but that the Court would not now enter into the merits, unless drove to it. He supposed his Lordship's counsel had considered the consequence of disclosing their defence, by filing such affidavits as had been opened. But before it went any farther, he asked the counsel for the prosecutrix, Mr. *Solicitor*, Serjeant *Davy*, and Sir *Fletcher Norton*, whether they opposed admitting his Lordship to bail. They declared that they would neither oppose nor consent to it, but left it to the Court, as the prosecution was instituted for public justice only.

Lord MANSFIELD.—As no affidavits have been read, we do not, and cannot go into the merits. But upon the circumstances that do appear, we think there is strong reason to take bail. His Lordship's surrender is a clear proof, that he does not

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mean to run away. Let them therefore be discharged, upon giving bail (his Lordship in 4,000*l.* and four sureties in 1,000*l.* each; and the two women in 400*l.* each, and four sureties in 100*l.* each) to appear at the next Surry Assizes (*q*).

N. B. They were indicted at the next Assizes, and, upon a trial of many hours, acquitted.

(*q*) The Justices of K. B. may bail in all cases at their discretion, 4 Inst. 71; 2 H. H. P. C. 129; Com. Dig. *Bail*, (F 3, 4); *R. v. Rudd*, 1 Cowp. 333, per *Ld. Mansfield*; except in the case of a contempt of the House of Lords or Commons, or any other Court at Westminster; see *Murray's Ca.*, 1 Will. 299; *Brass Crosby's Case*, post, 755; *R. v. Flower*, 8 T. R. 314; 4 Bla. Comm. 299. And unless it sufficiently appear to the Court upon the

warrant of commitment, that a felony has been committed, they are bound to bail a prisoner brought before them by *habeas corpus*; *R. v. Judd*, 2 T. R. 255; *R. v. Remnant*, 5 T. R. 169; *R. v. Marks*, 3 East, 157.—See Bac. Abr. *Bail in Crim. Ca.*; 2 Hawk. P. C. c. 15, s. 79. But a *hab. corp.* is not grantable to bring up a prisoner of war; *Spanish Sailor's Case*, post, 1324.

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EASTER TERM,—8 GEO. III. 1768.—K. B.

THE KING v. BUTLER and Others.

MOTION to quash an appointment of the defendants to be overseers of the poor of the town of Guildford in Surry, made by James Goodyer and John Pecke, two of the corporation justices, on Easter Monday, 20 April, 1767: there being another appointment made *by William Savage, the Mayor, and Thomas Parker, one of the county justices, of two other persons, on Easter Sunday, 19 April, which was insisted on to be the only valid appointment, as being prior in point of time, though alleged by the defendants to have been made clandestinely and fraudulently, at one o'clock in the morning. The statute 43 Eliz. c. 2, was also strongly relied on in favour of the Mayor's appointment; which, in sect. 8, enacts, that, "Mayors, bailiffs, or other head officers of every town corporate, being justices of the peace, shall have the same authority within their respective jurisdictions, either in Sessions or out of it, as is given by the said act to any two justices of the peace; and no other justice or justices to enter or meddle there." This, *Dunning*, Solicitor-General, argued, was to be confined to the Mayor or other presiding officer only, and that he alone has the power of appointing overseers; especially as, by the same section, aldermen of London are invested with the same power in their respective wards. In sect. 9, accounts are to be made up before the said head officer in the singular number. By sect. 10, in case no appointment of overseers be made in a town corporate, the penalty of 5*l.* is laid upon the mayor, alderman, (*viz.* of London), or head officer only; whereas in counties it is laid upon every acting justice of the peace. And, in sect. 11, the warrant for recovering the penalties is also grantable in the same manner.

The Court will not quash an appointment of overseers, after their year is expired. [Mayor of a corporation has not exclusive right to appoint. Appointment on a Sunday.]

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Mayor or head officer in towns corporate hath not the sole appointment of overseers.

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But by Lord MANSFIELD, C. J.—*Cui bono* is this application now made to quash the appointment after the year is expired? Upon this ground alone the rule must have been discharged. But I would [not] have it thought, that I put it off upon this ground, because I have any doubt of the question. The doctrine endeavoured to be maintained is a very strange one. What, shall a mayor of a town corporate (*r*), (where there may be a dozen parishes, where the right of voting for members perhaps may be by scot and lot, and he the returning officer), shall he alone appoint all the overseers in the town? Had such a power been ever dreamt of before, it must have been contested over and over, and would long since have been corrected by Parliament. The statute only means to give justices in corporations and head officers, where there are no justices, the same power as justices in counties; in Sessions, (where there *are justices), as well as out of it. *Quod omnes justic. concesserunt*. *Qu.* Is there any determination that an appointment on a Sunday is good?

ASTON, J.—I have a note from Mr. J. Bathurst, of K. and Clerkenwell (*s*), P. 13 Geo. 1, that an appointment made on Easter Sunday shall be good, it being a work of charity. (*Vide* Foley, 4. Determined on another point, because not said to be substantial householders).

LORD MANSFIELD.—Notwithstanding that reason, I should think, that an appointment on a Sunday is *primd facie* clandestine and bad (*t*).

YATES, ASTON, and WILLES, Js., agreed, that the Rule be discharged.

(*r*) See 50 G. 3, c. 49, s. 4.

(*s*) Foley, 4; 1 Bott, 17. An appointment made *bond fide* and without collusion on a Sunday is good; and if such appointment be prior to one made by other justices on the same day, it will be the valid one; *R. v. Merchant and Allen*, 1 Bott, 21. "There is a distinction between ministerial and judicial acts, for the first may be done upon the Sabbath day, but judicial acts may not. *Per Montagu*, C. J., in *Waite v. Inh. of Stokes*, Godb. 280; *Sivana v. Broome*, ante, 496, 526.

(*t*) So where there being a contest between two adverse sets of borough justices, each set met before midnight of Easter Eve, and each began making their appointments the instant the clock had struck twelve, and so continued for two hours; and one set made a fresh appointment at 8 o'clock on Sunday morning, Lord Mansfield said, "I do not know that there is any authority

which says, that an appointment made on a Sunday is good; but it certainly is not a day for such purposes as these; and therefore I will not give my sanction to any of the appointments: let all the appointments be set aside, and a *mandamus* be directed to make a new one; *R. v. Bridge-water*, 1 Cowp. 139. After the magistrates have made an appointment at one meeting, they are *functi officio*, and no other magistrates can appoint another overseer in the place of one claiming to be exempt, but such overseer must appeal to the Sessions; *R. v. Great Marlou*, 2 East, 244. At that time the appointment was required to be made early in Easter week, or within one month after Easter, by 43 Eliz. c. 2, s. 1. But now, by 54 Geo. 3, c. 91, the appointment is to be made on March 25th, or within 14 days next after. See *R. v. Sparrow*, 2 Stra. 1123, 1 Bott, 17.

GREEN v. FARMER.

S. C. 4 Burr. 2214.

A dyer has no
lien on goods
delivered to him

TROVER for 2000 yards of serge. Verdict for the plaintiffs, on this special case. Messrs. Henzleman purchased from

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in the course of
trade, but for the
price of the
dying.

the plaintiffs the goods in question by their packer, and they were delivered to the defendants, their dyers, to be dyed on their (Messrs. Henzleman's) account. Afterwards, Messrs. Henzleman and the plaintiffs agreed, that the plaintiffs should have their goods back again, who demanded them from the defendants, offering to pay what was due for the dying of them, but the defendants insisted upon being also paid a debt due from Messrs. Henzleman for dying other goods, over and above the price of dying these. The occasion of Messrs. Henzleman's agreeing that the plaintiffs should have their goods again, was their (the Henzlemans) having failed in their circumstances; and it was proved, that after notice of this failure the defendants had delivered back eleven pieces to Messrs. Aston and Hodgson, which had *in like manner been bought of them by Messrs. Henzleman's packer, and sent to the defendants to be dyed on Messrs. Henzleman's account, without insisting on being paid more than was due for dying the same; and they had also delivered back to the plaintiffs five pieces in white, without being paid any thing for them. *Qu.* Whether, under these circumstances, the defendants have a lien upon these goods, for anything more than the price of dying the same?

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This case was argued, at the bar, in Michaelmas and Hilary Terms; and for the plaintiffs were cited, Bro. tit. *Distress*, 92; *Ex parte Deese*, 1 Atk. 228; *Ex parte Ockenden*, 1 Atk. 235; for the defendants, Prec. Chanc. 580; 1 Stra. 556.

And in this Term Lord MANSFIELD, C. J., delivered the opinion of the Court.—This case is exactly the same as if the action had been brought by Henzleman, the plaintiff standing in his place. The general question is, how far the plaintiffs are bound to do justice to the defendants for a real debt due to them from Henzleman, before they can recover back these specific goods, or damages instead of them. The justice of allowing cross demands is supported by natural equity: the balance only is really due in such cases. But the common and established forms of law have, in general, directed separate remedies to be mutually had by different actions; and though, where the nature of the transaction consists in a variety of receipts and payments, the law allows the balance only to be the debt; yet, where mutual debts stand unconnected with each other, the *law hath said*, they shall not be set off. And Courts of equity have followed this rule, merely because it was the law. The natural reason of mankind was first shocked at this doctrine in the case of bankrupts; they thought it hard, *that a person should be bound to pay the whole that he owed to the bankrupt, and receive only a dividend of what the bankrupt owed him(v). This therefore was provided for by the statutes 4 Ann.(u) and 5 Geo. 2(w). Where there was no bankruptcy, the justice of setting off, (especially after death in

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(v) *Oughterlong v. Easterby*, 4 Taunt. 888; *Tampin v. Diggins*, 2 Camp. 312.—

But see 6 G. 4, c. 16, s. 50.

(u) C. 17.

(w) C. 30, s. 28.

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the administration of assets) struck men next, and was therefore provided for by the statutes, 2 Geo. 2(x), and 8 Geo. 2(y), of set-offs. But these statutes do not extend to create any lien on specific goods, unless where they can be construed to be deposited as a pledge. Natural equity is certainly much in favour of liens, so that courts of justice have always leaned that way as far as was consistent with positive law. They will therefore imply a contract of lien from the general course of trade, or from the nature of the particular mode of dealing between the parties. So where one has acted as a factor for another, every thing in his hands is construed to be a pledge. Two remarkable cases have been cited at the bar,—*Ex parte Deexe*, and *Ex parte Ockenden*; both of them well reported by Atkyns(z). In the former, Lord *Hardwicke* inclined to favour liens; but after mature deliberation he was of opinion in the latter, that he could not bring the goods detained within the general rule of liens. Both were bankrupt cases. I have notes of both. The one was the case of a packer, who *was allowed* to retain cloth for other debts besides what was due for packing: The other of a miller, who *was not allowed* to retain corn for other debts than the price of the grinding. In this case, according to my own note, Lord *Hardwicke* said, “Here is no evidence of a contract for a specific lien, nor of a lien arising by the general course of the trade. The law has created a specific lien for the price of grinding the corn; can I carry it farther?” Atkyns reports only what was said on 12th August, 1754: It stood over to the 20th December; and no precedents being then produced to the contrary, he determined according to his opinion in August, as reported by Atkyns. If these two cases at all clash, the weight of authority is certainly more preponderant in the latter, which was more maturely considered. But I think them very consistent. A packer, according to the course of trade, is certainly entitled to a lien upon all goods in his hands, being in the nature of a factor. Let me apply the principles of *Ockenden’s Case* to the present. Here is no factor, no agent, concerned: No transaction but the mere manufacture of dying: No course of trade or general usage to create a specific lien: No particular circumstances of their method of dealing with Henzleman. The very manner of dealing shews, they relied merely on his personal credit. We are therefore all of opinion that the defendants had no lien in the present case, but for the price of the dying of these specific goods(a): and therefore,

Postea must be delivered to the plaintiffs; the price of the dying being deducted at the trial out of the damages given by the jury.

(x) C. 22, s. 13.

(y) C. 24, s. 5.

(z) See the observations of Lord *Alvanley* on these two cases, 3 Bos. & Pul. 497; and also *Jones v. Smith*, 2 Ves. J. 372-8.

(a) In 6 East, 523, *A. D.* 1805, it was said in argument, that a dyer has a lien for

a general balance; on which the learned reporter observes in a note, that the same was said in argument in *Whithead v. Faughan*, 25 G. 3, (1 Co. B. L. 566), but that he had not been able to meet with any case in which it had been so ruled: he mentions the case of *Close v. Water-*

house, at York Assizes before *Rooke, J.*, where the defendants, dyers at Halifax, claimed to retain for their general balance, on the ground of usage; but the jury negatived such usage and found for the plaintiff; and the Court of K. B. afterwards discharged a rule for a new trial. T. 42 G. 3. But at *Nisi Prius, A. D. 1801*, where the defendants, being dyers, gave evidence that it was the practice of the trade to be entitled to a lien for the general balance, Lord *Kenyon* observed that it was established in the case of bankers, packers, and wharfingers, that they were entitled to such lien; and that he was of opinion with Lord *Mansfield*, in *Green v.*

Farmer, that a lien was established by the general course and practice of the particular trade. The jury under his direction found for the defendants; *Savill v. Barchard*, 4 Esp. N. P. 53. So the lien of a carrier for his general balance may be inferred from the evidence of the particular mode of dealing between the parties; but it is not to be favoured, neither can it be supported by a few instances, it not being founded in the common law; *Rushforth v. Hadfield*, 6 East, 519; *Butler v. Woolcot*, 2 N. R. 64, S. P. And see *Ex parte Smith*, 6 Ves. Jun. 447; *Foxcraft v. Devonshire, ante*, 193.

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PERKINS on demise of VOWE v. SEWELL.

S. C. 4 Burr. 2223.

IN ejectment: The jury found a special verdict: "That one William Dexter, being tenant in fee of the premisses, enfeoffed Henry, Earl of Derby, afterwards K. Henry 4, to hold to him and his heirs. Afterwards the King by letters patent under the duchy seal of Lancaster, 2 April, 7 Hen. 4, reciting said feoffment, and that Margaret, the wife of John Miton, was grand-daughter and heir of William Dexter; and that Miton and his wife had petitioned the King to be fully re infeoffed thereof; *nous veullantz cele partie soit fait, ceo que loy, bone foy, & conscience demandent*, have of our special grace given and granted to the said John Miton and Margaret his wife, and the heirs of the body of the said Margaret, the said premisses to be holden as of the King and his heirs, Dukes of Lancaster, as of the duchy of Lancaster in chief for ever; with reversion to the King and his heirs, Dukes of Lancaster, on failure of issue of said Margaret: Which grant was confirmed to Leonard Vowe, by letters patent under the Great Seal, 1st October, *20 Eliz.(b); and again 11th December, 27 Eliz. on a surrender of the former grant by Thomas Vowe, to be holden by the 20th part of a knight's fee and not *in capite*.—

An estate tail with reversion to the King in fee, must be clearly of the gift or provision of the King, to be protected by stat. 34 Hen. 8, c. 20, from being barred by a common recovery.

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Pedigree.

(b) These grants are more fully stated in *Vowe v. Smith*, cited in *Legat's Ca.*, 10 Rep. 110 b; and it appears there, 112 a, that the grant, by H. 4, was under the

duchy seal, whereas it ought to have been under the Great Seal, which was no doubt the reason of the confirmatory grant. *MSS. Serj. Hill.*

PERKINS.

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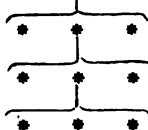
SEWELL.

PEDIGREE.

WILLIAM DEXTER of Haighton,
Enfeoffed the Earl of Derby—circa 1390.

WILLIAM DEXTER.

MARGARET DEXTER=JOHN MITON,
Grantees—7 H. IV. 1406.



LEONARD VOWE,
Heir of the body of Margaret Miton—20 Eliz. 1578.

THOMAS VOWE,
Grantee—27 Eliz. 1584.

--- VOWE.

THOMAS VOWE=JANE DOWLEY,—1652.

LEONARD VOWE=MARTHA BUTLER,—1697.

THOMAS VOWE.
Suffered a recovery, 1766.
Ob. 17th September, 1766.
Will dated 18th Aug. 1766.

--- VOWE.

RICHARD VOWE.

THOMAS VOWE,
Lessor of the plaintiff.

MARTHA.

MARY=
R. SPRAGGING. }

LUCY=
P. SHUTER. }

Lessors of the defendant.

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On 30th March, 1652, Thomas Vowe, then heir of the body of Margaret Miton, on his marriage with Jane Dowley enfeoffed John Fish and Thomas Collins; to the use of himself for life; remainder to said Jane for life; remainder to the heirs of the body of said Thomas Vowe on said Jane begotten; remainder to his own right heirs: and, in Easter Term, 1652, levied a fine to said uses. On 23d August, 1697, Leonard Vowe, the son and heir of the body of the said Thomas and Jane, on his marriage with Martha Butler, covenanted to levy a fine, which was afterwards levied; to his own use for life; remainder to trustees to preserve contingent remainders; remainder to said Martha for her life; remainder to the first and other sons of the marriage in tail male; remainder to trustees for a

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term of 500 years to raise portions for daughters; remainder to the right heirs of Leonard Vowe. On 19th and 20th May, 1766, Thomas Vowe, son and heir of said Leonard and Martha Vowe, by lease and release made a tenant to the *præcipe*, and declared the uses of a common recovery (which was accordingly suffered, Term Trin. 1766) to himself in fee. 18th August, 1766, Thomas Vowe made his will duly attested, reciting his father's settlement on him and his brothers in tail male, 23d August, 1697, which he had inadvertently barred by a recovery, and his intentions to restore the same: he therefore devises the premises to trustees, to pay out of the rents and profits his debts, legacies, funeral expences, and certain other charges; and afterwards to his nephew Thomas Vowe and the heirs males of his body; remainder to his nieces, Martha Vowe, Mary Spragging, and Lucy Shuter, in tail general; remainder to the daughters of Thomas Vowe; remainder to his own right heirs. Thomas Vowe the testator deceased, 17th September, 1766; and Martha Vowe, Mary Spragging, and Lucy Shuter became thereby heirs of the bodies of the several grantees in the letters patent of King Henry 4 and Queen Elizabeth. The questions arising upon this special verdict were; 1st. Whether the entail created by the letters patent of Hen. 4, with reversion to the King in fee, was, under all its circumstances, such an estate tail as was protected from being *barred by a common recovery by virtue of the statute, 34 Hen. 8, c. 20? 2dly. Whether, supposing it so, in case the reversion had been to the King, in right of his Crown, it makes any difference, that this is to the King in right of his duchy of Lancaster. But the Court directed it to be argued only on the first question at present; for, if that was with the plaintiff, the second was quite unnecessary. It was accordingly argued in Hilary Term, by *Hill*, for the plaintiff, and *Glyn*, Serjeant, for the defendant; and in the present Term, by *Eyre*, Recorder of London, for the plaintiff, and *Blackstone* for the defendant.

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For the plaintiff it was insisted,—1st. That no estate is intended to be protected by this statute, but such as has been *given or provided* by the King, in reward of some special services; because the preamble to the act speaks only of estates granted upon such considerations. 2dly. That the present grant appears upon the face of it to be merely a restitution of what belonged of right to the grantees; an act of justice, and not of bounty in the King; *ceo que loy, bone foy, et conscience demandent*; for which purpose it must be supposed, either,—3dly. That a legal title subsisted in the grantees, paramount the title of King Henry IV, by means of some condition or defeazance annexed to William Dexter's feoffment of the Earl of Derby: or, 4thly. That Dexter and his heirs had an equitable right, and that King Henry IV, when Earl of Derby, was merely a feoffee to uses.

To this, it was answered for the defendant,—1. That if the words of an enacting clause are wider and more extensive than the preamble, the preamble shall not *narrow and confine them:

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that though the principal purview of the act is to protect such estates tail as are granted for services done, yet that is not the only reason. The diminution of the King's feudal rights is also expressly alleged as another reason, which will happen oftener by cutting off entails, and thereby preventing infancies and wardships. That if services were indispensably necessary to bring a grant within the protection of the statute, the law would at this distance of time presume them: that in the statute of fines, 32 Hen. 8, c. 36, there is the same protection of estates tail, the reversion of which is in the Crown, and *in pari materid* both statutes should be uniformly construed. That in 1 And. 140, and Co. Litt. 373, where this statute is fully explained, not a word appears that services must be stated in the grant (c). 2. That an entail, which has lasted 360 years under the protection of this statute, ought not now to be shaken by presumptions and conjectures. Its having been so long unbarred gives a presumption, that the owners knew it was unbarable. The first attempt to alter the entail was in 1652, when there was no King in being; and all the crown lands, as well in reversion as in possession, were vested in trustees for sale (d): and if the reversion is once out of the Crown, the protection is gone; Co. Litt. 372 b; 2 Jon. 251 (e). After

(c) The purview (in the enacting part) provides against recoveries suffered by such tenants in tail, and Ld. Coke, in Co. Lit. 373 a, says, that although the word "such" may seem to couple the body of the act to the preamble, yet "such" shall be taken for "such in equal mischief;" and therefore, and from expressions in the act, he held the body of the act should extend to future, though the preamble is of past, gifts in tail. This authority makes against Blackstone, though cited by him, because he before admits the principal intent of the act is to prevent such estates tail, as are granted on services. In fact the only mischief intended to be remedied was the alienation of such estates tail: therefore, according to Blackstone's concession, the alienation of such estates as were not granted for services is not, to use Lord Coke's words, in equal mischief with those mentioned in the preamble, and consequently the word "such" in the body of the act, construed by him to mean "such in equal mischief" does not extend to them. Indeed, the only mischief appears by the preamble to be the alienations of estates tail granted for services, and therefore the act ought to have been construed to extend no further; even if there had been in the purview no words of reference to the preamble: but as there are, it seems no ground for rejecting them.

The other part of Blackstone's argument, that, at this distance of time, services should be presumed (if necessary) admits of this answer, that a different consideration from services is expressed in the grant; and it is not only a different consideration, but a consideration absolutely inconsistent with

that of services, and therefore incompatible with such a presumption as mentioned by Blackstone. As to the st. 32 H. 8, c. 36, there is not, as mentioned by Blackstone, the same protection of estates tail, the reversion of which is in the Crown: for that act does not expressly provide that a fine shall not bar estates tail, the reversion of which is in the Crown, as the 34 H. 8, c. 20, does with respect to recoveries; but it leaves such fines to be of the like force, as if the act had not been made: and Lord Coke (372 b, 373 a) is of opinion, that a fine with proclamations will not bar such estates as are by that act not barrable by recoveries, by reason of the words in 34 H. 8, there particularly taken notice of by Lord Coke.

As to the last part of Blackstone's argument, that "not a word appears in 1 And. 140, and Co. Lit. 373, that services must be stated in the grant;" the consideration ought to be mentioned, and is so of course; or if not, in what cases the omission may be supplied by averments and proofs is a matter that naturally would not occur, or if it did occur, would not be necessary to be enquired into, in the construction of this act: but the Judges, in the case referred to in 1 And. 140 [*Wiseman v. Bernard*; S. C. 2 Rep. 15 a, Moor, 195] took notice of the recital of the act, and that the word "such" in all other parts of the act applies to no "recoveries, tenures, or lands, but such as were before mentioned." MSS. Serj. HILL.

(d) See *Mitford v. Elliott*, 8 Taunt. 1, 1 B. Mo. 434.

(e) *Gardner v. Bambridge*, there cited, and also in T. Raym. 288, 358, by the name of *Gardiner's Case*. See also Lord *Chesterfield's Ca.*, Hardr. 409.

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the fines in 1652 and 1697, the lands are resettled in tail. 3. That there is no ground to suppose a condition or defeazance annexed to Dexter's feoffment, as the feoffment is recited and no mention made of any defeazance or condition. 4. That supposing the Earl of Derby a feoffee to uses, which is not proved, still the grant of Henry IV. was free and gratuitous. For as the law of uses then stood before the stat. 1 Ric. 3, c. 5, if the King, when a private man, was seised to a use, upon the assumption of the Crown the use was extinguished, and the King became absolute owner of the estate. *Vide* stat. 7 Hen. 4, c. 5, & 12. To regrant it to the feoffor might be generous and honourable, but was (legally speaking) gratuitous. But it could not be the execution of a *use; because the King [• 659] only grants an estate tail, reserving the fee in himself;—makes it a tenure *in capite*;—and to be holden of the duchy of Lancaster: which is quite incompatible with the idea of the Earl of Derby being merely a feoffee to uses, which must be executed in the same plight, as when the original feoffment was made.

Lord MANSFIELD, C. J.—It is certain that the preamble of a statute cannot restrain the enacting part of it, where the enacting part is clearly larger than the preamble. But in this case the estates mentioned in the enacting part clearly refer to those in the preamble by the word "*such*," which runs through the whole. It must therefore be admitted, that in order to obtain the protection of the statute of Hen. 8, the estate tail must be of the *gift* or *provision* of the King, by way of reward. As for the services, which are the consideration of such gift, these must at a distance of time be presumed, and need not be proved. To take it out of the statute you must shew that it is not of the gift or provision of the King. And in the present case it is plainly not so upon the face of it. The petition is founded upon no other consideration than that Elizabeth Miton was cousin and heir of Dexter, who enfeoffed the Earl of Derby. No merits are mentioned, notwithstanding the statute of 4 Hen. 4, c. 4, was then recent. The King himself states, that he was bound to make the grant by *law*, *good faith*, and *conscience*. What the circumstances of fact were, cannot now be discovered, whether a defeazance, a condition, or a use, or any thing else: nor is it material to know. It is enough that the King has recited generally, that he was *bound* to do it. It cannot therefore be a *gift*. As to the objection, that the King granted only a particular estate, and kept back the fee, that might be all he was bound to do.—Nor can we reason very conclusively from the conduct of such a prince as Henry the Fourth. He might possibly do only half justice. Such things have happened in later times. Lord Anglesey, after the Restoration, was obliged to restore the estates he had got during the rebellion in Ireland; yet many of the poor owners were glad to compound, and take leases for 99 years, instead of the fee. Upon the whole, as the estate

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was not *of the King's gift, I think it not within the protection of the statute, and therefore the recovery is good.

YATES, J., of the same opinion. The Court will not stretch to enlarge the interpretation of a statute which prohibits the natural right of alienation by tenant in tail (f).

ASTON and WILLES, Js., of the same opinion.

Judgment for the plaintiff.

(f) For an estate tail of the gift or provision of the King is the only perpetuity which can be created without the aid of the Legislature (see *Mulgrave v. Mounson*, 2 Freem. 17); and can only be barred by an act of Parliament, as was done in the case of Sir R. Strickland by 30 G. 3, c. 51. No alteration in the limitations of an estate tail, whereof the reversion continues in the Crown, will enable the tenant in tail to bar his issue; *Murrey* dem. Earl of Derby v. *Eyton*, Sir T. Jon. 237; T. Raym. 260, 286, 319, 338; 2 Show. 104; Pollex. 491; wherethe learning on this subject is discussed at great length. See also *Mitford v. Elliott*, 8 Taunt. 1; 1 B. Mo. 434, where it was held, that a reversion to the Crown, expectant on the determination of an estate tail, granted by the Crown to a subject for services, was not barred by either of two private acts of Parliament, which had been passed for confirming a settlement of the

estate made by the tenant in tail, which settlement purported to bar such reversion. Where a person conveyed lands to the Crown, to the intent that the Crown should reconvey them to the same person in tail, reserving the ultimate reversion to the Crown: such an estate was held not to be within the protection of the statute, it being a fraudulent conveyance to create a perpetuity; *Johnson v. Earl of Derby*, Pigot Rec. 201. Where a tenant in tail of the gift of the Crown, the reversion in the Crown, suffered a common recovery before the 34 H. 8, he gained a base fee, descendible and alienable, so long as there was issue in tail, and the reversion was still in the Crown; *Neal* dem. Duke of *Athol v. Wilding*, 1 Wils. 275. See Pig. Rec. 83 *et seq.*; Bac. Abr. *Prerog.* (E) 3, pa. 554; Id. *Fines & R.* (C) pa. 233; Com. Dig. *Estate*, (B 31); Vin. Abr. *Common Rec.* (Z); and 5 Cruise's Dig. 454 (3d ed.).

TRINITY TERM,—8 GEO. III. 1768.—K. B.

ALDERSON and Others, Assignees, v. TEMPLE.

S. C. 4 Burr. 2235.

Preference of one creditor by a bankrupt in sending him, without his knowledge, a bill by the post, is fraudulent and void, when done on the eve of the bankruptcy.

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A. B. in London, in contemplation of his bankruptcy, sent a note of 600*l.*, given him by Brian and Everard in exchange for two notes of 300*l.* each, to the defendant at Trowbridge. The letter containing this note was put into the post on Friday morning, and came to him the Monday following; and on the Saturday morning A. B. committed several acts of bankruptcy, upon which a commission issued. The defendant was a creditor of A. B. to a greater amount than the 600*l.* On an action against the defendant by the assignees of A. B., for the value of the note, a case was reserved upon the following questions:—1. Whether this was a complete transfer of the note to the defendant by merely putting it in the post?—2. Whether, if it was, such a preference of one creditor to the rest would be valid?

Lord MANSFIELD, C. J.—It is material to observe what is *not* in the case, as well as what *is* in it. There does not appear any course of dealing between the bankrupt and the de-

fendant in sending of notes indorsed. The letter which inclosed the note was suppressed by the defendant at the trial. It is not said to what amount the debt due from the bankrupt to the defendant was. Nor is there any specific appropriation of the note by the bankrupt when he sent it. It is also found, that Everard and Brian were creditors for two notes of the same amount as were given by them to the bankrupt (a). The only question therefore is, whether, under all the circumstances, the indorsing and sending the note was fraudulent, and therefore void? Commercial transactions should be determined on solid principles, not upon nice subtilties of law. I shall therefore avoid going into the question, whether a contract is complete with or without delivery of possession. The true rule in that case is, to regard the solid justice of the transaction from its own circumstances. If a man has bills of exchange sent by the post, or goods consigned on shipboard, or sent by a common carrier, and has paid a valuable consideration for them, the contract is undoubtedly complete. But if the consideration is not paid, the property is not held to be vested by such delivery. In the case of — and *Atkyns*, cited from *Strange* (b), the honesty of the case might induce the Court to make the *judgment they did. And indeed, that judgment may be supported by other reasons than those given in the report. [*662]

Now, as to the present question: Fraudulent *grants and conveyances* are acts of bankruptcy. Other fraudulent grants are made void (c). All acts to defraud creditors, or to defraud the public law of the land, as the statutes of bankruptcy are, are absolutely void. It has been determined, that a conveyance of all a man's property in trade to pay a *bond fide* creditor of the most meritorious nature, though not amounting to half the debt, is fraudulent. Why? Because it is not an act in the ordinary course of business, and must inevitably produce an act of bankruptcy, and it defeats the equality intended by the law. So if the conveyance be not of *all*, but of great part, and the excepted part is merely colourable, it is also void. If the conveyance be for the benefit of all the creditors except one, or naming all the rest and omitting him (as happened in a *Bristol* case), it is void; and so held by Lord *Hardwicke*. If the conveyance be to distribute all his effects just as the statutes of bankruptcy direct, it is fraudulent and void; because a man shall not choose his own assignees, and thereby defraud the law, which vests the power over bankrupts in the Great Seal (d). A general question has been started, whether a man may or may not, at the eve of a bankruptcy, give a preference to a par-

(a) This sentence seems to be inaccurate: it should be, "were creditors for two notes they had taken in exchange, amounting together to the same sum as the note given by them to the bankrupt;" and which two notes were not discharged; see 4 Burr. 2238.

(b) *Atkin v. Barwick*, 1 Stra. 165, Fort. 353, 10 Mod. 431, 11 Mod. 295, S. C.

And see *Neate v. Ball*, 2 East, 117, and the cases there referred to.

(c) See *Hooper v. Smith*, ante, 441, and cases there cited.

(d) S. P. per Lord *Mansfield* in *Harman v. Fisher*, Cowp. 123, and in *Rust v. Cooper*, Id. 632; per Lord *Eldon*, C., in *Dutton v. Morrison*, 17 Ves. J. 199.

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ticular creditor? I think he may, and he may not. If one demands it first, or sues him, or threatens him, without fraud, the preference is good (e). But where it is manifestly to defeat the law, it is bad (f). In the present case there is no course of dealing of this kind; no demand; no threat; but it is done with a positive view of iniquity. They indorse Brian and Everard's note to a third person, which was given in confidence, as a counterbalance to their own. Next, this is certainly an act not complete, as between the parties: it is not done with the knowledge of both. A bank*rupt cannot make such a preference in his own closet. Besides, the note was not then due; it had still time to run. I am always diffident of hurting the course of trade and commerce; and therefore choose to determine this case upon the circumstance of the fraud, the *quo animo* with which it was done, rather than to lay down any subtle general principles, which might have a bad effect in cases otherwise circumstanced. And therefore, upon the footing of the fraud, I think the *postea* should be delivered to the plaintiff.

YATES, J.—Assent of some sort is necessary in order to complete a contract (g). We cannot presume the defendant's consent in this case, but by taking into contemplation the bankruptcy itself. I give no opinion as to the point, but I should doubt whether this was not in itself an act of bankruptcy.

ASTON, J.—There is no true reason given in the case in *Strange* for the judgment. As to this being in itself an act of bankruptcy, I should not conceive it so (h), because the words of the statute Jac. 1, are technical words, and do not reach *choses in action*. In all the rest I concur.

WILLES, J.—Same opinion.

Postea to the plaintiff.

(e) *Accord. Thompson v. Freeman*, 1 T. R. 155, and n.; *Smith v. Payne*, 6 T. R. 152; *Hartshorn v. Sloddon*, 2 Bos. & P. 582, where the distinction between payments and deliveries by a bankrupt, which are voluntary, and those which are not so, is fully considered and discussed; *Dixon v. Baldwin*, 5 East, 175; *Crosby v. Crouch*, 11 East, 256, 2 Camp. 166; *Wheelwright v. Jackson*, 5 Taunt. 109; *Fidgeon v. Sharp*, 1 Marsh. 196; *Yeates v. Groves*, 1 Ves. J. 280; *Ex parte Scudamore*, 3 Ves. J. 85; *Graff v. Grefshulhe*, 1 Camp. 89; *Bayley v. Ballard*, Id. 416; *Alley v. Hotson*, 4 Camp. 325; *De Tastet v. Carrol*,

1 Stark. 88; *Poland v. Glyn*, 2 D. & R. 310.

(f) *Accord. Martin v. Poustress*, 4 Burr. 2477; *Harman v. Fishar*, Cowp. 117; *Rust v. Cooper*, Id. 629; *Singleton v. Butler*, 2 Bos. & P. 283; *Thornton v. Hargreaves*, 7 East, 544; *Wilson v. Balfour*, 2 Camp. 579. See also *Gladstone v. Hadwen*, 1 M. & S. 517; *Harvey v. Liddiard*, 1 Stark. 123.

(g) *Hagus v. Rolleston*, 4 Burr. 2174.

(h) *S. P. Martin v. Poustress*, 4 Burr. 2477; *Rust v. Cooper*, 2 Cowp. 629; *Manton v. Moore*, 7 T. R. 71; *Bach v. Gooch*, Holt, N. P. C. 16, 4 Camp. 234, & C.

MICH. TERM,—9 GEO. III. 1768.—K. B.

DICKSON v. FISHER.

S. C. 4 Burr. 2267.

ACTION for bribery (*a*), at the election for members of Parliament, at Colchester. Verdict for the plaintiff on this special case:—The precept for election had been directed “To the Mayor *and Commonalty* of Colchester,” but the words “*and commonalty*” were struck through with a pen; and the plaintiff gave it (that is, the precept) in evidence, disannexed and separate from the writ and indenture of return, though it was originally annexed to and returned with the writ and indenture to the sheriff, but not filed *with* the same in the Crown-office. The defendant offered, but was not permitted to give, parol evidence to prove, that the words “*and commonalty*” were in the precept, and not obliterated, when the same was delivered to the mayor, and returned by him. Q. 1. Whether the instrument above stated and given in evidence proved the declaration, viz. that the precept issued, directed *to the mayor* of Colchester? 2. Whether the above parol evidence ought to have been admitted for the defendant?

A record found in the proper office must be intended to have been always in the plight in which it is found. And parol evidence shall not be admitted to prove it wrong.

The Court held, that the words “*and commonalty*” were mere surplusage, and that the precept, being found in the proper office with those words obliterated, shall be intended to have been always right, and therefore proved the declaration (*b*). 2. That parol evidence ought not to be admitted to vitiate the record and prove it to have been wrong, though it might have been admitted in order to prove it *right* (*c*).

Postea to the plaintiff.

(*a*) On 2 G. 2, c. 24: see next case, note (*c*).

(*b*) So, where the declaration set forth the precept from the sheriff to the portreeve of a borough, the improper insertion of the word “*if*” in setting forth the writ in the declaration is not a fatal variance, but may be rejected as surplusage; *King*

v. Pippet, 1 T. R. 235. And it is not a material variance, if the declaration state the precept to have issued to the *bailiffs* of the borough, but the precept produced in evidence is directed to the *bailiff*; *Warre v. Harbin*, 2 H. Bla. 113.

(*c*) See Bul. N. P. 221; *Leighton v. Leighton*, 1 Stra. 210.

HILARY TERM,—9 GEO. III. 1769.—K. B.

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SUTTON v. BISHOP.

S. C. 4 Burr. 2283.

YATES, J., delivered the opinion of himself, **ASTON** and **WILLES, Js.** (*absente* Lord **MANSFIELD** at the argument).—The defendant, being bribed at the last election for members of

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On the statute against bribery, making an affidavit is a sufficient discovery to indemnify the discoverer.

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But a conviction must follow, and it will be good, though the witness be previously convicted of bribery since his discovery.

Parliament at Reading, in order to indemnify himself, made affidavit before one Gray, a commissioner to take affidavits, of the same bribery by one Earles, the person that bribed him: upon which, Mr. Bindley, one of the candidates, brought an action against Earles: and, *e converso*, the present plaintiff brought this action for bribery against Bishop(a). By some management on the part of Sutton and Earles, and laches on the part of Bindley and Bishop, the present action was tried first(b). Qu. How far Bishop, the defendant, is indemnified under statute 2 Geo. 2(c). Objection 1. That Bishop is not a discoverer, within the meaning of that act, because he is not the plaintiff. But this making affidavit was held a sufficient discovery(d). Objection 2. That the prosecution against Earles was not followed up with due diligence(e). But it appears to have been merely by an accident, that the trial of this cause was delayed; and Earles has been since convicted on Bishop's evidence. *Objection 3. That Bishop did not give evidence against Earles till after his own conviction. But we think, that though it is necessary that a conviction should follow, yet the indemnity is given only upon the discovery. And it is not in the witness's power to forward the suit. The reason why a conviction is required, is, 1. To shew, that the discovery is

(a) It is no objection to the competency of a witness for the plaintiff to prove such bribery, that a similar action was pending against the witness himself for bribery at the same election, and that he claimed to be the first discoverer of the bribery of the defendant, and meant to avail himself of it, if necessary, in case of the defendant's conviction; *Hevard v. Shipley*, 4 East, 180. So a person, who gives a bribe to another, is a competent witness to prove the bribery; *Mead v. Robinson*, Willes, 422. So in the principal case, Bishop had received a bribe from Earles, and a verdict had actually passed against him, but no objection was taken to his competency as a witness against Earles; 4 Burr. 2284.

(b) Both causes were set down for trial on the same day; and were actually tried within half an hour of each other: but the cause of *Sutton v. Bishop* standing first upon the judge's paper, he would not invert the order by trying the cause of *Bingley v. Earles* first, though the latter had been commenced two months before the former. The consequence was, that *Sutton* got a verdict against *Bishop*; for the latter could not shew that he had made a discovery of another person so as to be thereof convicted. On the argument, two points were made:—1. Whether *Bishop* was entitled to avail himself of the protection of this eighth clause of the act; (see next note); 2. In what mode he could avail himself of it, supposing him entitled to it; 4 Burr. 2284.

(c) C. 24, s. 8, by which it is enacted, "that if any person offending against that act, shall, within twelve months after the

election, discover any other person offending against it, so that such person so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against the act, shall be indemnified and discharged of all penalties, &c."

(d) Where C. D. procured E. F. to make an affidavit disclosing bribery, and afterwards brought an action against a third person, who was convicted on the testimony of E. F., E. F. was held to be the discoverer, and not C. D., so as to be indemnified as such in an action against himself; *Sibly v. Cuming*, 4 Burr. 2464. So where C. D., in a similar action against himself, proved at the trial that he had been plaintiff in an action against another person for bribery at the same election, and had therein obtained judgment, by producing the record thereof, Lord Mansfield observed, "that the Court had not said, nor would say, 'that a plaintiff cannot be the discoverer:' but the act of Parliament does not make him so, or consider him as the discoverer. Here is no evidence that the plaintiff was the discoverer: and another person must have been the witness; for the plaintiff could not be the witness himself. It is not to be presumed, without any evidence at all of it, that the plaintiff in the action was the discoverer:" and a new trial was granted; *Cargenven v. Cuming*, 4 Burr. 2504.

(e) See s. 11, of the act, and 9 G. 2, c. 38: as to what shall be considered due diligence, see *Petrie v. White*, 3 T. R. 5.

true; 2. That the offender may be punished. But the great question that arises on this case is, What is a sufficient conviction on this act, in order to give an indemnity; whether a verdict, or a judgment. Though there is a distinction in criminal cases between the conviction(*f*) and attainder, yet there is no such distinction in civil cases between verdict and judgment, so as that any effect can follow from a naked verdict. In a civil action no penalty takes place till judgment be given on the verdict. The penalty is demanded as a debt, and is not due till judgment is given. Any other construction would open the door to frauds. An offender would prosecute another to verdict, and thereby secure his own indemnity, and then proceed no further. Therefore we think, that in the present case there is no conviction till judgment. The verdict alone cannot be pleaded, and therefore cannot be given in evidence. But when judgment is obtained, the reward of the discoverer's merit by such discovery will take place. We at first thought, the regular and correct way for the defendant, in this particular instance, to take advantage of it would be by *audita querela*. But we now think, we may save the expence of it by a special rule. We also think that Sutton should enter up judgment upon this verdict, in order to indemnify himself(*g*). And then, both records being brought into Court, a special rule(*h*) may be made to stay execution on Sutton's judgment, on the circumstances of the case. And such rule will countervail all the operations of the judgment, such as disability, &c. as well as an *audita querela*(*k*).

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And a naked verdict only, without a judgment, is not a sufficient conviction.

(*f*) To render a witness, convicted of a crime, incompetent, it is necessary to prove the judgment, as well as the conviction, which can only be done by producing the record or a copy of it. The conviction alone is not sufficient; for it may have been quashed upon motion in arrest of judgment; *Lee v. Gansel*, 1 Cowp. 3. See Phil. Ev. 26, (ed. 1817); Com. Dig. *Testmoigne*, (A) 5; *R. v. Careinion*, 8 East, 77.

(*g*) *Quare tamen*, whether such judgment would be an indemnity, inasmuch as Sutton was only the plaintiff? See note (*d*), ante.

(*h*) A similar rule to stay proceedings was made, on the authority of this case, in *Petrie v. White*, 3 T. R. 12.

(*k*) But the Court, in the case of *Pugh v. Curgewen*, 3 Wils. 35, refused to stay

judgment upon the *postea*, on the ground that the defendant had made a discovery against another person, who had been convicted on the defendant's evidence; but left him to take his remedy in some other way, as he should be advised. So, in a similar case, the Court put the defendant to his *audita querela*, the proceedings on which are reported, and all the authorities collected, in *Lord Porchester v. Petrie*, 2 Wms. Saund. 148 b, *in notis*. As to when the Court will relieve on motion, or only by *audita querela*, and the proceedings thereon, see *Turner v. Davies*, Id. 137 d, and notes.

As to actions for bribery, see *Sutton v. Norton*, ante, 317; *Combe v. Pitt*, ante, 523; *Dickson v. Fisher*, ante, 664.

THE KING v. The Guardians of the Poor in CANTERBURY. [667]

S. C. 4 Burr. 2290.

MOTION for a *mandamus* to make a regular poor's rate, on a suggestion that, in the present rate, no personal property was rated.

YATES, J.—The general point in this case seems never to have been sufficiently determined, notwithstanding the Case of

Mandamus does not lie to overseers to make a rate, without first appealing to the Sessions.

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Qu. How far
personal estate
is rateable.

The *King* and *St. Leonard, Shoreditch* (l). And there are great difficulties arising from the words of the act, 43 Eliz. (m), compared with those of the land-tax acts. Personal property is not mentioned in this act. And in the case of lead mines they were held not rateable, because not specified in the act. But I give no decisive opinion. Upon this rule, however, I have no difficulty to say, we cannot grant it. No *mandamus* ever goes to make a rate (n). There is an appeal, by statute 17 Geo. 2 (o), as well with regard to the leaving out as to the inequality. But it is objected that this is a fundamental error, one species of rateable property being omitted, and therefore a *mandamus* will lie to rate such property. I apprehend that not to be so. We cannot grant *mandamus*'s to rate *property*; but *persons, in respect of property*. And for them an appeal lies to the Sessions (p). In the present case the rate was made in November last, and is not appealed from. Another objection to the rule is, that it does not appear that any persons have a clear liquidated personal estate. Overseers are not to rate at random, and then leave persons to make out their true property. It is said, that if we don't relieve in this mode, there is no other method of redress. Try the other legal mode. If the overseers ought to rate, and after appeal continue obstinate, it will be then time enough to apply for a *mandamus*.

- [*668] *ASTON, J.—I give no positive opinion about the main question. If the determination in *Bulstrode* be any thing more than a *dictum*, it seems strange that it never was carried into execution. Personal property is omitted in 43 Eliz., though inserted in the land-tax acts. Nothing but the clear residue of personal estate, after debts paid, can be liable to rateability. Great difficulties are thereby laid on the overseers. The present application steps over the jurisdiction of the Sessions, and comes here too soon.

WILLES, J.—If this were a new case, I should incline to think, from comparing the 43 Eliz. and the land-tax acts, that personal property is not liable. Non-user would go very far to set aside all the *dicta* in the books. And I would use all the *acumen ingenii* I am master of to avoid it. I think a clear liquidated personal estate is all that can, in any sense, be rateable (q).—But I give no opinion that I will be bound by. I agree

(l) 2 Salk. 483, Ca. temp. Holt, 508.

(m) C. 2.

(n) But in *R. v. Barnstable*, Foley, 26; 1 Bott, 79; 1 Barnard. 137, the Court said, "We grant a *mandamus* to make a rate; but where a rate is already made, we cannot grant a *mandamus* to make an equal rate." And in *R. v. Weobly*, 1 Bott, 81, Lee, C. J., said, "It has been determined that this Court cannot grant a *mandamus* to make a rate, if one be already made; or to make an equal rate, if it be unequal on the face of it." S. P. *Liddleston v. Mayor of Exeter*, Comb. 422. And see *R. v. Edwards*, ante, 637.

(o) C. 38, s. 4, amended by 50 G. 3, c. 49. See *R. v. Portsmouth*, ante, 398.

(p) *Durrant v. Boys*, 6 T. R. 580.

(q) It appears that in Michaelmas Term following, the Court granted a rule for a *mandamus* to the justices of Canterbury to rate *personal property* throughout the town; 1 Bott, 112. And it is now decided that personal property is rateable. The first determination to that effect was Sir *Anthony Earby's* Ca., 2 Bulst. 354; again the Court seemed inclined to think it rateable in *R. v. Andover*, 2 Cowp. 556; and in *R. v. Hill*, Id. 613, stock in trade was held rateable on the ground of *usage*.

with my brothers that we cannot grant this rule, though I fear it is only delay, and that we must by and by determine the principal question.

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Rule discharged, *absente* Lord MANSFIELD, C. J.

S. P. R. v. *Rodd*, Cald. 147; R. v. *Dursley*, 6 T. R. 53. But it was afterwards expressly held, that personal property is rateable *independent of usage*, for the usage of a particular place cannot control the operation of a general statute; R. v. *Hogg*, 1 T. R. 721. Again, it was decided that stock in trade is rateable, in R. v. *White*, 4 T. R. 771; S. P. R. v. *Mass*, 6 T. R. 154, in which case Ld. *Kenyon* said, "if a person choose to keep his property in money, and the fact of his possessing it be

clearly proved, he is rateable for it." Again, it was held that stock in trade is rateable, if productive; R. v. *Darlington*, Id. 468. So stock in trade is rateable notwithstanding it has never been rated in the parish, unless there be some circumstances to take it out of the general rule; but in case an individual is not rated for it, the Sessions ought to amend the rate, and not to quash it; R. v. *Ambleside*, 16 East, 380; and see R. v. *Whitney*, post, 709.

LOVEGROVE v. BETHELL.

HELD by Lord MANSFIELD, C. J., *et tot. Cur.*, on a motion for a *mandamus* to the Judge of the Ecclesiastical Court to grant probate of a will to A. B., that a *lis pendens* was sufficient cause to discharge the rule; and accordingly,

Lis pendens a sufficient cause against a *mandamus* to grant probate of a will.

Rule for *mandamus nisi* discharged (r).

(r) See *Dunkin v. Mun*, T. Raym. 235; 299, Carth. 457. And see R. v. Dr. *Anon.* 1 Ventr. 335; R. v. *Raynes*, 1 Salk. *Harrie*, ante, 430.

EASTER TERM,—9 GEO. III. 1769.—K. B.

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THE KING v. WALPOLE ST. PETER'S in NORFOLK.

S. C. Burr. Sett. Ca. 638.

BLACKSTONE moved to set aside an order of Sessions in the Isle of Ely, whereby an order of two justices removing Henry Shekell, from Wisbech St. Peter's in the said Isle of Ely, to Walpole St. Peter's in Norfolk, was confirmed, on this special case, viz.—The pauper was settled with his father, as part of his family, at Outwell in the Isle of Ely, and then let himself as a hired servant for a year, to one Martin, at Parson's Drove, and continued therein six months, and then went back to his father at Outwell, and lived three years as part of his family there.

He then enlisted as a soldier, and continued in the service four years, and was discharged at Cork in Ireland between Candlemas and Lady-day, 1764. About three months after, he came home to his father, who then lived and occupied a farm of 50*l.* *per annum* at Walpole, and continued there twelve or fourteen weeks; and then worked at different places as a labourer till Candlemas, 1767, when he married and went back

Listing as a soldier, such a separation from his father's family, that the son does not afterwards change his derivative settlement, though the father changes his own. (Not litigated).

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with his wife to his father at Walpole, maintaining himself and wife by his labour till Lady-day following; and then rented and occupied a cottage of 30s. a year at Walpole, but was never charged to or paid any parish rates; and there continued till Lady-day, 1768; after which he worked as a labourer, in different places, till December, 1768, when he was removed from Wisbech to Walpole; and never gained any settlement of his own.

To this order of removal it was objected, that his last legal settlement was with his father in Outwell, and that his enlistment was a separation from his father's family, according to the Cases of *East and West Woodhey*, Stra. 438; *St. Mich. Norwich* and *St. Matthew, Ipswich*, Stra. 831. That, by the mutiny act, the examination of any soldier (a) on oath shall be admitted at any time as evidence of his then last legal settlement. That being once separated or emancipated, he could not afterwards become part of his father's family, so as to change his derivative settlement, when his father changed his original one (b).

Rule to shew cause, and made absolute in the same Term, no cause being shewn.

(a) *R. v. Clayton-le-moors*, 5 T. R. 704; *R. v. Warley*, 6 T. R. 534; *R. v. Warminster*, 3 B. & A. 121.

(b) It appears from the report in Burr. Sett. Ca., that the pauper was about the age of nineteen when he enlisted. So, where the son of a Scotchman, being a minor, enlisted, his father not having then acquired a settlement, and did not return from serving abroad till after his father's death, the settlement of the father acquired after their separation was not communicated to him. *Ld. Kenyon*—"He had ceased to be a part of his father's family, and had put himself under the control and government of others;" *R. v. Stanwix*, 5 T. R. 670. But where a minor entered into the same militia, in which his father was serjeant, and lived with him, the latter receiving his pay, and the son served till he was twenty-three years old, the settlement gained by the father during such time was communicated to him; for here the pauper continued to be part of his father's family; *R. v. Woburn*, 8 T. R. 479. And the rule is the same, whether the pauper voluntarily enlist, or be drawn for the militia; *R. v. Hardwick*, 5 B. & A. 176. So where the father of an apprentice to a certificate man found him in clothes, &c., and the latter occasionally visited him; and when the son was eighteen years old, the former acquired a new settlement, and the son returned to him after he was twenty-one, the son's settlement followed the new settlement of his father. *Per Bayley, J.*—"Unless he gains a settlement by his service, his domicile continues to be his father's house, and he is liable to be removed thither at any time.

If indeed he had withdrawn himself from his father's family after twenty-one, no doubt it would be an emancipation from that period. But a separation, whilst under twenty-one, does not produce that effect, unless a subsequent settlement be gained;" *R. v. Huggate*, 2 B. & A. 582. In these cases the child did not return till after twenty-one; but the rule to be extracted from the cases is this; "if the child be separated from the parents, and without marrying or obtaining any settlement for himself return to them again during the age of pupillage, he is to all intents a part of his father's family, and his settlement will vary with that of his father: but if, when that time arrives, when in estimation of law the child wants no further protection from the father, he is not for the purpose of a derivative settlement to be deemed part of that family;" *Per Ld. Kenyon*, in *R. v. Roach*, 6 T. R. 253; *R. v. Hardwick*, 11 East, 578, acc. "The rule of law is, that every new settlement acquired by the parent is communicated to the children so long as they remain members of his family. During the minority of the child, he will remain almost under any circumstances unemancipated; but where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated unless in fact the child continues part of the family;" *per Abbott, C. J.*, 5 B. & A. 178. The different modes of emancipation are enumerated by *Ld. Kenyon*, in *R. v. Wotton-cum-Twambrookes*, 3 T. R. 355. And see *R. v. Uckfield*, 5 M. & S. 214; *R. v. Bleasby*, 3 B. & A. 377, and 54 G. 3, c. 170, s. 2, 3.

POCHIN v. PAWLEY.

ACTION of *assumpsit* against the surveyor of a turnpike road by a farmer, employed by order of the commissioners to repair the road. At Leicester Assizes, ASTON, J., was of opinion, that there was no evidence of any contract with the surveyor personally and the plaintiff; but that the contract was made with the commissioners, and that the surveyor was only their servant or messenger: and therefore he would have nonsuited the plaintiff, but he refused to be nonsuited, and a jury of farmers gave a verdict for the plaintiff. And now, on a motion for a new trial, the Court was unanimously of opinion with Mr. J. Aston; and, though they held, that the commissioners could not be personally sued, being too numerous, yet their treasurer might (c). And, as the plaintiff had refused to be nonsuited contrary to the opinion of the Judge, they granted the new trial *without costs* (d).

In like manner, as where a plaintiff submits to a nonsuit, in compliance with the erroneous opinion of a Judge, the nonsuit shall be set aside without costs (e).

Surveyor of turnpike roads not personally liable to answer the labourers; but the commissioners or their treasurer.

Where plaintiff refuses to be nonsuit, contrary to the opinion of the Judge; new trial (if granted) shall be without costs.

If he submits to an erroneous nonsuit, it shall be set aside without costs.

(c) This is a false report, and is so reported, to give an ostensible but false reason for setting aside the verdict.—*MSS. Serj. HILL*, who refers to *Horsley v. Bell*, Ambl. 770 (1 Bro. C. C. 101, *S. C.* in not.), where it is said, that in the principal case it was held, that the action must be against the commissioners: also to 1 Eq. Ca. Abr. 24 (D) (*Meriet v. Wymondsell*, Hardr. 205, *S. C.*), Id. 308 (B). See also *Eaton v. Bell*, 5 B. & A. 34; 3 G. 4, c. 126, s. 74.

(d) Where a verdict was obtained by a trick, it was set aside without costs; *Anderson v. George*, 1 Burr. 352. So a verdict obtained by surprise was set aside without costs, in *Edie v. E. I. Comp.*, ante, 298; *Gagnier v. Stonehouse*, Tidd's Pr. 921, S. P. (ed. 1821).

(e) *S. P. Buscall v. Hogg*, 3 Wils. 146, and a nonsuit was set aside without costs in *Rice v. Shute*, post, 698; *Rackam v. Jessup*, 3 Wils. 338.

BIDMEAD v. GALE.

S. C. 4 Burr. 2432.

COVENANT for 25*l.* due on articles, whereby the plaintiff and defendant mutually covenanted to run each a horse, and that the loser should pay the winner 25*l.* play or pay: and that, at all events, the defendant should pay the plaintiff 5*l.* before such a day. The breach assigned was, that the defendant did not run his horse or pay the money. Verdict for the plaintiff at Gloucester Assizes.

Hall and *Price* moved in arrest of judgment, that this, being a match for less than 50*l.*, was contrary to law, and that horse-racing is within the statute of gaming; Stra. 1159 (f).

Ashhurst and *Selwin*, contra. That they are not within the statute of gaming; Lord Raym. 1366. That stat. 18 Geo. 2 (g),

A match for 25*l.* a side is a running for 50*l.* within the horse-race act.

(f) *Goodburn v. Marley*; *Clayton v. Jennings*, post, 706, acc. 707, n. This statute is confined to *bond fide* horse-racing, and therefore does not

(g) Or rather 13 G. 2, c. 19—see post, legalize a wager to be won by a perform-

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allows by implication horse-racing for 50*l*. That, by a manuscript report of the case in Stra. 1159, the Court took a distinction between horse-racing and betting thereat. That, at Newmarket, 25*l*. on a side is held to be 50*l*., there being a difference of 50*l*. between winning and losing: and this is the case of all subscription plates. If ten men had subscribed 5*l*. each, or five men 10*l*., it would be a plate for 50*l*. If the 25*l*. a side had been called a purse of 50*l*., or laid out in a plate, it would certainly have been good.

Price, in reply, observed, that this was but a running for 45*l*. even by the Newmarket law; for, according to the articles, the defendant was to return 5*l*. to the plaintiff: so that the plaintiff subscribed but 20*l*. and the defendant 25*l*. (But *quære*, as the defendant was at all events to pay the plaintiff 5*l*., whether this was not a subscription of 30*l*. by the defendant, and 20*l*. by the plaintiff?)

The Court took time to consider, and afterwards gave judgment for the plaintiff, because two sums of 25*l*. make 50*l*.

ance on the road in a post chaise; *Ximenes*
v. Jaques, 6 T. R. 499: or that one horse
shall perform a certain distance on the high

road in less time than two; *Whaley v.*
Pajot, 2 Bos. & P. 51.

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PERRIN v. BLAKE.

S. C. 4 Burr. 3579.

Held in K. B. that a devise to J. W. for life, remainder to trustees during the life of J. W., remainder to the heirs of the body of J. W., is an estate for life, there being words of restriction that J. W. shall not sell for any longer than his own life, and the estate being devised to that intent. [But that judgment afterwards reversed in *Cam. Scacc.*, where it was held to be an estate tail: and the latter opinion has been confirmed by all subsequent authorities].

ACTION of trespass: Special verdict (*h*).

William Williams, by his last will, after giving portions to his three daughters, disposes of his "temporal estate in manner following: It is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his life: and, to that intent, I give, devise, and bequeath, all the rest and residue of my estate to my son John Williams, and any son my wife may be ensient of at my death, for and during the term of their natural lives; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said sons, John Williams and the said infant; the remainder to the heirs of the bodies of my said sons, John Williams and the said infant, lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters equally to be divided between them. And I do declare it to be my will and pleasure, that the share or

(*h*) Not so: for the question arose upon a demurrer to a replication. A feigned action of trespass was brought, to which the defendant pleaded the will of W. W. The plaintiff replied a recovery suffer-

ed, on the ground that the son took an estate tail; and to this the defendant demurred; 1 Doug. 343, n. 3, where the circumstances of this case are detailed.

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part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid." William Williams died, 4th February, 1723, leaving issue one son, named John Williams, and three daughters, Bonnetta, Hannah, and Anne, and his wife not ensient. John Williams suffered a recovery, and declared the uses to himself and his heirs.

N. B. This was a case from Jamaica, and in fact, instead of a recovery, the supposed estate tail of John Williams was endeavoured to be barred, by a lease and release enrolled, according to the local law of that country. It came on before a committee of the Privy Council, who directed a case to be stated for the opinion of the Court of King's Bench, who refused to receive it in that shape. And therefore, a feigned action was brought, and the case above stated was by consent reserved at the trial.

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It was argued in this, and Trinity Terms; the question being merely this, Whether John Williams took by this will an estate for life or in tail. And in Michaelmas Term following, it was adjudged by Lord MANSFIELD, C. J., ASTON and WILLES, Js., that he took only an estate for life: YATES, J., *contra*, that he took an estate tail. But I was not present, when the judgment of the Court was delivered (i).

(i) A full statement of this celebrated case is to be found in 1 Harg. Law Tracts, 490, which also contain Mr. J. BLACKSTONE's very elaborate and valuable judgment. This was a case which gave rise to much discussion at the time, and the judgment of the Court of K. B. seems to have been generally disapproved of; and indeed it was reversed, 1st February, 1772, in the Exchequer Chamber, by six out of the eight judges there, viz. by Parker, C. B., Adams, B., Gould, J., Perrot, B., Blackstone, J., and Nares, J., against De Grey, C. J., and Smythe, B. Mr. Fearne says, that that reversal restored the venerable uniform train of preceding judgments and opinions upon the same point to its former authority. An appeal was then brought in the House of Lords, but the dispute was eventually compromised between the parties without coming to a decision there. So that it was held to be an estate tail by seven judges, viz. Yates, Parker, Adams, Gould, Perrot, Blackstone and Nares, and to be an estate for life by five, viz., Lord Mansfield, Aston, Willes, De Grey and Smythe, see 1 Doug. 342. Mr. Fearne also disapproves of the decision in K. B., and has treated the subject so elaborately and at such great length, in his distinguished essay on Contingent Remainders, p. 156 *et seq.*, that it would be in vain to attempt to do more than refer the reader to that learned work. However, it may be remarked, that the ground of the decision of the minority of the judges was the intention of the testator; and the sole difference of opinion was upon this point, whe-

ther such intention or supposed intention should be suffered to supersede an ancient and established rule of law, which is commonly called "the rule in *Shelley's case*;" as to which see *Hayes v. Foorde*, *post*, 698. Mr. Fearne observes upon this head, "Why were not the authorities of *Papillon v. Voies*, 2 P. Wms. 471; *Coulson v. Coulson*, 2 Stra. 1125, 2 Atk. 246; *Sayer v. Masterman*, Ambl. 344, and *Wright v. Pearson*, Ambl. 358, 1 Eden, 119, in every one of which there was a limitation to trustees to support contingent remainders, sufficient to rule the case of *Perrin v. Blake*. Indeed, upon examining the matter, the limitation to trustees to support contingent remainders, seems to set the force of the two arguments upon the intention, and upon the testator's being *inops consilii*, in direct opposition to each other. For if we suppose the testator acquainted with the necessity, or use, of limiting an estate to trustees to support contingent remainders, it scarcely seems reasonable to suppose him unacquainted with the legal nature and force of a limitation to the heirs of the body, after a preceding estate for life; and then, as we cannot say he is *inops consilii*, there exists no pretence for construing his words otherwise than according to their legal import and operation. On the other hand, if we admit he did not understand the use or intention of the limitation to trustees to support, &c. but only used it, because he had seen it used in some other will or settlement; then no particular intention can be inferred from his inserting that clause. But

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admitting that those who argue against the strict observance of the rule I have been speaking of, should chance to have the intention of the testator on their side, it remains for them to consider, whether a rule of law, inviolably observed for more than three hundred years past, can ever be a decent sacrifice to the presumptive construction of an undetermined or illiterate testator's intention." He also refers to the following cases decided subsequent to that of *Perrin v. Blake*, viz. *Hayes v. Poorde*, post, 698; *Hodgson v. Ambrose*, 1 Doug. 337; *Thong v. Bedford*, 1 Bro.

C. C. 313. See also *Roe dem. Thong v. Bedford*, 4 M. & S. 362, a case arising upon the same will. Also *Jones v. Morgan*, 1 Bro. C. C. 206; *Broomer v. Bagot*, 1 Mer. 271. It is hoped the reader will pardon the foregoing extract from Mr. Fearne's book, as it has been inserted under the impression, that it would be acceptable to those persons who might not have his invaluable work at hand. An abstract of Mr. J. BLACKSTONE's judgment is to be found in 6 Cruise Dig. 255, 3rd ed.

HALL v. HARDING.

S. C. 4 Burr. 2426.

In case of an absolutely stinted common in point of number, one commoner may distrein the supernumerary cattle of another; but not if an admeasurement is necessary—as where the stint has relation to the quantity of the commoner's land.

IN trespass the question was, whether one commoner can distrein the supernumerary cattle of another commoner, having a stinted common in point of number with relation to the quantity of land, viz. two sheep for every acre.

On demurrer and argument, Lord MANSFIELD, C. J., delivered the opinion of the Court. It is contended by the plaintiff, that Harding (being only a commoner) could not distrein another commoner, but must have a writ of admeasurement or an action on the case:—For the defendant, that this being a stinted common, the supernumerary cattle are as the cattle of a stranger. To support which the Year-book, 46 Ed. 3, 12, is cited; but from thence nothing can be collected conclusively, as is observed, in 2 Lutw. 1240. Another case cited was, Yelv. 129, Cro. Jac. 208 (k). But, in 2 Roll. Abr. 267, the case is otherwise reported, and what was done does not appear, therefore no argument can be conclusively drawn from thence. *Trulock and White*, 1 Roll. Abr. 405, 6, was also cited to shew that the tenant might *distrein the cattle of the lord. But there by the custom the land was to lie fresh every second year, and therefore the lord had no colour of right to put in any cattle. But, where there is no such manifest exclusion, a commoner cannot distrein the lord's cattle; *Hoddesdon and Grevil*, Yelv. 104. Where there is any colour of right the lord cannot be a trespasser, neither can he be a stranger in his own soil (l). *Dixon and James*, 2 Lutw. 1238, Freem. 273, was also relied upon, on both sides.

It is unnecessary to give any opinion on the power of a commoner to distrein, where the number of the cattle is certain in itself, and has no relation to the land. The latter is the case here; it has relation to the land. Two sheep are allowed for every acre. This is the material distinction, upon which the present case will turn. There is no proof necessary, that twenty sheep are more than ten. But in the latter part of the present case a medium is necessary to prove, that the cattle are

(k) *Kentick v. Pargiter*; Brownl. 187. S.C.

(l) See post, 818, & n. (t) *ibid*.

supernumerary, viz. an admeasurement of the commoner's land, to shew that he has put in more than two sheep for each acre.

The old remedies for a surcharge of common were by assise, &c. Bracton, 4; F. N. B. (m).

In *Robert Marys's* case, 9 Co. (n), it is said, that case will lie. But a commoner could not lawfully distrein another commoner's cattle, because it is making himself a judge in his own cause, and taking execution in the first instance.

In the case of *levancy* and *couchancy* (o), one commoner cannot distrein another's cattle for a surcharge; but must try, by a jury, the number accommodated to the land. The same thing is also necessary here, to ascertain what quantity of land the plaintiff had.

On the whole, where there is a colour of a right, we think a commoner cannot distrein another's cattle (p). If there is no colour, he may; and therefore he may certainly distrein a *stranger's. And where any admeasurement lies between commoners, one cannot distrein the cattle of the other, because that is taking upon him to determine the admeasurement himself. The consequence of which is, that this distress was illegal, and there must be,

Judgment for the plaintiff.

(m) Fol. [125], *Writ of admeasurement of pasture*, as to which see also Com. Dig. *Common* (1); Bac. Abr. *Id.* (C), s. 2; Vin. Abr. *Id.* (D a).

(n) Fol. 111 b; see *Atkinson v. Teasdale*, post, 817; *Wells v. Walling*, post, 1233.

(o) Post, 1233, n. (z)

(p) But where A., being possessed of a quantity of land in a common field, and having a right of common over the whole field;

and B. having also a right of common over the whole field, they entered into an agreement not to exercise their respective rights for a certain term of years, and each party covenanted to that effect: it was held, that if during the term the cattle of B. come upon the land of A., he may distrein them *damage feasant*; *Whiteman v. King*, 3 H. Bl. 4. And see the cases referred to in n. (n), *supra*.

N. B. In this Term, the great cause of *Miller and Taylor* (q) was determined for the plaintiff in behalf of literary property, by Lord MANSFIELD, C. J., ASTON and WILLES, Js.; YATES, J., *contra* (r).

(q) Reported at great length in 4 Burr. 2303.

(r) See *Tonson v. Collins*, ante, 301, & 345, n. (d').

TRINITY TERM,—9 GEO. III. 1769.—K. B.

DAVENPORT v. TYRREL.

ERROR from the Court of King's Bench in Ireland. In ejectment the case was, that Maurice Tyrrel being a Papist died seised of lands in Ballycaher, leaving two sons Richard and James also Papists. By the statute *of 2 Anne, in Ireland, estates in fee simple or fee tail belonging to Papists descend in gavelkind. But on the death of Maurice, in 1704, his son Richard entered alone, and held the same till his death for sixty-two years, and in the mean time settled the same by fine and recovery and marriage settlement, to which James, his brother,

The possession of one co-heir in gavelkind is not the possession of the other, where he enters with an adverse intent, to oust the other.

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was privy. On the death of Richard in 1766 leaving two daughters, James the lessor of the plaintiff brought an ejectment against his two nieces, for two thirds of the moiety of Ballycaher, claimed by him as co-heir in gavelkind to Maurice, and recovered against them by default and probably by collusion: This ejectment was now brought against the widow of Richard for the other third of the said moiety, which she claimed as her dower and also under the settlement. On the trial at *Nisi Prius* the Judge directed the jury to find a verdict for the plaintiff; upon which a bill of exceptions was tendered, setting out in substance this case, which was sealed by the Judge and returned into the King's Bench in Ireland, with the *Nisi Prius* record; and thereupon the Court, upon frequent and solemn argument, gave judgment for the defendant.

And now upon a writ of error it was argued, by *Mansfield* for the plaintiff.—1. That the bill of exceptions was improperly introduced upon the record, in the Court of King's Bench in Ireland, being in the nature of a writ of error; and therefore should have been determined in this Court in the first instance. That the Irish Court of King's Bench should have given judgment according to the verdict, and then the bill of exceptions have been returned to England to be argued and adjudged as a writ of error, and not in arrest of judgment. Statute West. 2, c. 31; *Money and Leach*, B. R., T. 1766 (a); F. N. B. 122 (b); Bro. *Repleader*, 1; *Serle* and Lord *Barrington*, Stra. 826; *Strode* and *Palmer*, Lilly. Entr. 248.

[*677] *2. As to the merits. As Richard and James were co-heirs in gavelkind, the possession of the one is also the possession of the other; therefore no argument can be drawn from the long possession of Richard; Bro. *Coparceners*, 1; Moor, 868 (c); *Halmesley and Price*, Cro. Eliz. (d); *Stirling* and *Pennington* (e); *Ford and Grey* (f); Co. Litt. 252b; Salk. 391 (g); Litt. sect. 398. Next, if we suppose it a disseisin, then Richard was a purchaser of James's moiety, and by the Popery laws that is forbidden. The whole is a manifest evasion of the laws for suppressing Popery.

Blackstone, for the defendant.—That though the usual course has been to treat bills of exceptions as writs of error, yet they may be used in arrest of judgment, 2 Lev. 237; especially in the King's Bench, where the record is already before the King himself. The construction of the Irish Court is warranted by [the] Year-Books, P. 3 Hen. 4, 14; M. 27 Hen. 8, 24: and there has been no determination to the contrary since, and this construction is agreeable to reason and common sense. 2. As to the merits. It does not appear that Maurice was seised in fee-simple or fee-tail of the lands in Ballacaher; but only, that he was seised. It might be an estate for life. An

(a) *Ante*, 555, and see n. (r), *ante*, 557, and the form of the bill of exceptions in that case, Bull. N. P. 317.

(b) P. 50, 4to edit. 1755.

(c) *Small v. Dale*; Hob. 120, S. C.

(d) Or *Hemley v. Price*, Cro. Eliz. 639.

(e) Or *Sterling v. Pennington*, 14 Vin. Abr. *Joint-tenants*, (P a), pl. 5.

(f) 6 Mod. 44.

(g) *Fisher v. Wigg*.

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estate of inheritance is necessary for the statute to work upon. The Court in such a case will not presume it. Next, sixty-two years' sole possession and the fine are a bar to this action by common law. This is a disseisin. It is a question, not between jointenants or tenants in common, but tenants in gavelkind, who are male coparceners; Cro. Car. 303 (4); Co. Litt. 140. There is a difference between the entry of one parcener, claiming the whole, *before* any entry of the other, and *after*;—the former is a disseisin; Co. Litt. 373 b, 374 a; Ibid. 248 b; *Stirling and Pennington*, Canc. 25th February, 1739; Viner, *Jointenants*, 512. The true state of the law is this—1. If both enter, there must be actual ouster to make a disseisin.—2. If one enters generally, and takes the profits, this is no disseisin. 3. If one enters *specialty*, as in the present case, claiming right to the whole, and taking the whole profits, this is a disseisin: but, after her death, the sister may enter, unless barred by the statute of limitations. 4. If, after a special entry, one by feoffment or fine destroys the coparcenary, and takes back [the] estate in fee, and dies; the entry of the sister is barred. Here Richard entered alone in 1704—took the whole profits—settled the estate in 1727, with the privity of James—levied a fine—and died after sixty-two years' possession. The entry of James is clearly barred, and he can maintain no ejectment. The Popery laws of Ireland make no difference. They only reduce the lands of Papists to gavelkind, but do not alter the nature and consequences of coparcenary at the common law.

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Per Cur.—This case shews how much better a motion for a new trial would have been, than a bill of exceptions. The Judge at *Nisi Prius* did clearly wrong in his direction to find for the plaintiff. The Popery acts make the lands of Papists to be gavelkind; that is their whole effect. And then the adverse possession of one gavelkind tenant will not operate as the possession of both. That rule is a qualified rule: and in the present case, the acts of ownership, fine, &c. make an actual ouster (i). The statute of limitations operates here as an ex-

(h) *Blunden v. Baugh*; W. Jon. 315, S. C.

(i) The possession of one tenant in common is the possession of another, as the receipt of rent by one is a sufficient receipt by the other to prevent his being barred by the statute of limitations. This was holden in the case of *Coppinger v. Keating*, on a writ of error from Ireland, M. 22 G. 3, in a case where one of two brothers professing the Popish religion entered on the death of his elder brother upon lands, of which they were tenants in common in consequence of the gaveling act, directing that the lands of persons of that persuasion shall descend to all the males according to the custom of gavelkind, and held them for several years until his death; and the Court determined that the son of the elder brother was not barred by the statute of limitations, as the uncle was tenant in common with him under that act, no ac-

tual ouster being found: *per Lawrence, J.*, in *Peaceable v. Read*, 1 East, 577, in which case the point decided was, that one tenant in common levying a fine of the whole, and taking the rents and profits without account for nearly five years, is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and that consequently the latter may maintain ejectment without making an actual entry. In that case the principal one was not cited or adverted to.

As to gavelkind lands, see 2 Bla. Comm. 34; Bac. Abr. *Gavelkind*; *Do* dem. *Lushington v. Bishop of Landaff*, 2 N. R. 491, and *Long v. Lamy*, *ante*, 265, and cases there referred to. As to purchases by Papists, see n. (p), *ante*, 151; and as to their disabilities, see Mr. Butler's note to Co. Litt. 391 a, [note 346].

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[*679] tinguishment of the remedy of the one, not as giving the estate to the other. We must consider Maurice as dying seised in fee, for (by YATES, J.) in pleading, the larger estate is always presumed. "Dying seised" is "dying seised in fee." Therefore we are of opinion to affirm this judgment on the merits, but as an objection has been started in point of *form, in that the Irish Court of King's Bench has determined on the bill of exceptions, which is contrary to the general practice, we will consider of that point (*k*).

Bill of exceptions is in nature of a writ of error; and cannot be determined in the Court out of which the record issues.

The Court afterwards seemed to think the objection could not be got over; but no judgment was given: the plaintiff in error not pressing it, as the Court was against him on the merits; and the defendant in error being satisfied with her judgment in the Court below, and her perception of the rents and profits, being only a tenant in dower.

(*k*) S. P. *Symmers v. Regem*, 2 Cowp. 501; *Thurston v. Slatford*, Salk. 284; *R. v. Inhabitants of Preston*, Ca. temp. Hardw. 249, *acc.* See also Willes' R. 535, n. (*b*);

1 Bac. Abr. *Bill of Exceptions*. A bill of exceptions is given in certain cases in the Courts of Scotland, by 55 G. 3, c. 42, s. 7.



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